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CONTENTS

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JURISTIC SCIENCE AND LAW

THE common law on any point," says Judge Baldwin, "existed, in theory at least, before any case in which it may be applied. It was the practice of the people, or the rule which to them seemed naturally right." [1] Hence he argues that the teacher or writer who endeavors to put scientific method behind the reported cases which form the chief jural materials of our Anglo-American system is too academic. His teaching has "created a new peril" in our law since it leads to neglect of the "human element" of popular practice, of which the rule is a mere formulation.[2] Others reach in another way a similar conclusion adverse to logical analysis and systematic development of legal materials. Thus we are told that "the rules of law are established by the self-interest of the dominant class, so far as it can impose its will upon those who are weaker." [3] Again: "The law is the resultant of the conflict of forces which arises from the struggle for existence among men. Ultimately

[1] "Education for the Bar in the United States," 9 AMERICAN POLITICAL SCIENCE REVIEW, 437, 447.

[2] *Id.* 448.

[3] BROOKS ADAMS IN CENTRALIZATION AND THE LAW, 45.

"Upon conditions that the ruling class finds profitable to its aims and advantageous to its power, are built codes of morality as well as of law, which codes are but reflections of those all-potent class interests." MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 8.

"From this point of view we get the meaning also of the statement often made that law tends to spread, to generalize itself. The spreading, the generalizing, is dominated entirely by interest-group needs." BENTLEY, THE PROCESS OF GOVERNMENT, 287. Compare Mr. Dooley: "The Supreme Coort follows th' illiction rethurns."

these forces become fused under the necessity of obtaining expression through a single mouthpiece, and that fusion, effected under this pressure, we call the will of the sovereign." [4] Hence "there are . . . no abstract legal principles." [5] "The dominant class, whether it be priests or usurers or soldiers or bankers, will shape the law to favor themselves." [6] It is futile to do more than perceive the ideal of justice that "favors most perfectly the dominant class" [7] and observe how the law inevitably conforms thereto. On either theory the jurist is no more than an observer; the legislator or judge is but the subconscious instrument through which the popular practice is formulated or the will of the dominant class is made effective. There is nothing for the teacher of law to do beyond orderly arrangement for the purpose of dogmatic exposition. The rules are given. He is to set them forth as so many propositions of a unique series of independent phenomena.

Such views are in large part to be explained as a reaction from the nineteenth-century theory of eternal legal conceptions involved in the very idea of justice and containing potentially an exact rule for every case to be reached by an absolute process of logical deduction. Indeed Judge Baldwin speaks the language of that doctrine when he says that the common-law rule existed in theory before the case in which it was discovered and applied. Moreover it would be idle to pretend that there are not rules in any legal system of which one or the other of the foregoing views gives an accurate account. Thus the rules as to indorsement of negotiable instruments arose out of the custom of merchants, and our law of mining on the public domain had its origin in the custom of miners. Likewise there is much in the ephemeral penal legislation of every country which fails to maintain itself in the legal system precisely because it is an expression of the self-interest of the dominant class for the time being and nothing more.[8] Yet before we accept

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[4] CENTRALIZATION AND THE LAW, 23. [5] *Id.* 45.

[6] *Id.* 63–64.

[7] *Ibid.*

[8] Compare legislation as to cutting weeds to prevent their going to seed (Indiana, BURNS' ANN. STAT. 1914, §§ 5524–25; Texas, MCEACHIN'S CIV. STAT., Arts. 6601–02) with the common law as set forth in Giles *v.* Walker, 24 Q. B. D. 656 (1890); Harndon *v.* Stultz, 124 Iowa, 734, 100 N. W. 851 (1904). Also compare the common law as to contributory negligence with recent American statutes altering the rule solely for the benefit of railway employees, leaving the common law in force for all other cases.

either as an adequate account of the genesis of law in general, and so give over the attempt to deal academically with law as a rational phenomenon, it may be worth while to try them with reference to typical rules of everyday application. The rules selected for this purpose should be well established, should be rules that dwell at peace with their neighbors in the legal system, are questioned neither by theoretical writers as arbitrary and anomalous, nor by practitioners as theoretical and over refined, and should have an authentic history. Two such cases will be considered.

In Roman law if a tree set in the land of Titius takes root in the land of Maevius, it belongs to Maevius; if it takes root in the land of each, it is common property.[9] What is the common law on this point? In *Masters* v. *Pollie* (1620) [10] it is held that in such a case the tree belongs to the owner of the land in which it is planted, because "the main part of the tree being in the soil of the plaintiff, the residue of the tree belongs to him also." It is added that Bracton so holds. But this is an error, for Bracton lays down the Roman rule in the very words of the Institutes.[11] In *Waterman* v. *Soper* (1697–98) [12] Lord Holt, apparently in ignorance of the prior decision, ruled that "if A plants a tree upon the extremest limit of his land and the tree growing extend its root into the land of B next adjoining, A and B are tenants in common of this tree." The reasons are not stated, but the words used indicate that the doctrine was taken from the Roman texts.[13] In *Holder* v. *Coates* (1827), [14] on both of the prior cases being cited, Littledale, J., followed the earlier, which he thought laid down the preferable rule, and such is now the recognized doctrine.[15]

Obviously the two distinct doctrines which contended in our law books for two hundred years do not represent a divergence in the practice of the English people or a divergence in popular, extra-

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[9] INST. II, 1, 31.

[10] 2 Rolle, 141.

[11] "For reason does not permit that a tree belong to anyone else than to him in whose land it has struck root." (1569 ed. fol. 10.)

[12] 1 Ld. Raym. 737. *Cf.* Anon., 2 Rolle, 255 (1623).

[13] *Cf.* "And therefore a tree planted near a boundary, if it stretch out its roots into the neighbor's ground also, becomes common property." INST. II, 1, 31.

[14] Moody & M. 112.

[15] Lyman *v.* Hale, 11 Conn. 177 (1836); Dubois *v.* Beaver, 25 N. Y. 123 (1862); Skinner *v.* Wilder, 38 Vt. 115 (1865).

legal views of what was naturally right. The English people did not practise one rule in this connection from the thirteenth to the seventeenth century, another from the end of the seventeenth century to the second quarter of the nineteenth century, and then revert to the seventeenth-century practice, except as the decisions of the courts may have determined individual action. Nor were these divergent lines of decision due to disagreement as to what was naturally, in contrast with what was legally, right. So far from trying to decide upon non-technical, non-legal grounds, in each case the basis of the rule announced was found either in authority or in juristic reasoning from analogy. Nor may these divergent lines of decision be attributed to class conflict or to any struggle of a dominant class to "impose its will upon those who are weaker." In each case the parties to the dispute were adjoining landowners — squires as like as not — and it is futile to search for any interest of landowner or landless on one side or the other. Moreover the origin of each rule may readily be traced.

To understand the doctrine of the Roman law we must go back to Aristotle, who lays down that plants are composed of the two elements earth and water drawn from the soil where they root.[16] Hence if the tree planted in the land of Titius takes root in the land of Maevius, the tree is composed of earth and water belonging to Maevius taken from Maevius by the tree on the land of Titius, but added in a definite tangible form, namely the tree, not in an undistinguishable form as in the case of alluvion. Thus the rule adopted by the Roman jurists grows out of the Aristotelian theory as to form and substance. One has in his mind the idea of a saw. He has in his hand the materials of steel and wood. By shaping these materials according to the idea of a saw he gives them the form of a saw.[17] Form, therefore, is the idea objectively realized. Accordingly the form of the tree is the material of the earth and water, taken from the soil, realizing the idea of a tree. Whoever owns the materials should also own the form. The very language of the jurists on this question of ownership of border trees, as preserved in the Digest,[18] is palpably taken from Greek philosophical

[16] HIST. ANIMAL. V, 1; METEOROL. IV, 8. See SOKOLOWSKI, PHILOSOPHIE IM PRIVATRECHT, I, 148 *ff.*

[17] BENN, THE GREEK PHILOSOPHERS (2 ed.), 282.

[18] DIG. XXIX, 2, 9, § 2, XLI, 1, 26, § 1.

treatises. It represents, not the practice of Romans in the third century A. D., nor the resultant of class struggles at Rome, then or theretofore, but the philosophical ideas of Greece in the fourth century B. C., seven centuries before, to which the jurists turned in their desire to decide controversies upon principles and in accordance with reason. And when Bracton, ten centuries later, felt called on to state a rule for such controversies, he did not take a referendum of the English people as to their views of what was naturally right, nor even ask himself what he thought was naturally right, nor did he send out a questionnaire as to what rule the people practised, if indeed they practised any on such a point, but he turned to the book which to him stood for an authoritative version of legal reason, and assumed as a matter of course that the rule there set forth should and would be followed by an English tribunal. Thus he laid down a rule in language seven hundred years old derived by a process of legal reasoning from a philosophical theory nearly seventeen hundred years old. When three centuries and a half later the Court of King's Bench ruled that "if a tree grows in a hedge which divides the land of A and B and by its roots takes nourishment in the land of A and also of B, they are tenants in common of this tree," [19] the Greek-philosophical Roman-law reason that the roots draw nourishment from each tract shows that the court relied upon Bracton.[20]

In the seventeenth century, as has been seen, the Court of King's Bench broke away from the Roman-law doctrine. Whether it did so intelligently and intentionally may perhaps be doubted, since Bracton was cited for a rule quite different from the one which he had announced. But in any event the basis of the new rule, which ultimately prevailed in Anglo-American law, was clearly enough the analogy of the old Germanic notion of seisin which had become one of the chief premises in common-law reasoning. In 1620 Coke had but recently been dismissed from his office of Chief Justice and had fourteen years yet to live. The judges and practitioners in the common-law courts were full of the ideas and methods made

[19] Anon. (1622), 2 Rolle, 255.

[20] Probably this was a case where it was not known on which side of the line the tree had been planted or one where it was originally planted on the line. But if the latter, why not hold that each owns the part on his land? It is reasonably evident that Bracton's text was a determining influence.

familiar to us by Coke upon Littleton. The Court of King's Bench was thoroughly in the grip of the strict law. Hence in endeavoring to decide a question according to reason it turned to a time-honored common-law analogy. Titius planted the tree and is seised of the trunk, which is the main thing, no matter where the roots may stray, and he cannot restrain these roots from wandering.[21]

When Lord Holt went back to the rule of the Roman law, a different spirit was becoming manifest in the common-law courts. The advocate of the economic interpretation may tell us, and tell us rightly, that a new economic order was behind the liberalizing of law throughout Europe which is marked on the Continent by the rise of the law-of-nature school and in England by the development of equity and the reception and absorption of the law merchant. But for the most part this liberalizing movement did no more than make thoughtful lawyers restive under the arbitrary rules of the strict law. Judges did not dream of finding law otherwise than through authority or through legal reason. If, therefore, there was no express rule in the common-law books, or if the old English authorities were not known to them, it was natural that they turn to the Roman books, which were regarded as an embodiment of pure legal reason. Lord Holt in particular was much inclined to cite and to rely upon the civil law.[22] When a particular Roman rule was taken over under the influence of this idea it by no means followed that it actually expressed sound legal reason. Often it had been formulated by the accidents of Roman legal history and expressed ideas which had lost their vitality already in antiquity.[23] Such exotics in our legal system are not to be explained by looking to the practice of the English people or to popular ideas of natural justice, nor can they be traced to struggles of class with class in English history or the self-interest of the dominant class for the moment. They derive rather from the belief

[21] "Le plaintiff ne poyet limit le roots del arbor how far they shall grow and go." 2 Rolle, 141 (1623).

[22] Lane *v.* Cotton, 1 Ld. Raym. 646, 652 (1701); Knight *v.* Cambridge, 2 Ld. Raym. 1349 (1724); Coggs *v.* Bernard, 2 Ld. Raym. 909, 915 (1703); City of London *v.* Wood, 12 Mod. 669, 686 (1701). In Lane *v.* Cotton he says: "The principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things." 12 Mod. 472, 482.

[23] I have discussed one remarkable example in a paper entitled "Legacies on Impossible or Illegal Conditions Precedent," 3 ILL. LAW REV. 1, 23.

of judges in an absolute justice discoverable through reason and an overtrusting faith that the Roman jurists possessed the key to reason.

When the rule which now prevails was established (1827), the Romanizing tendency was spent. The maturity of law has no little affinity with the strict law. It regards reason as much less important than adherence to the established rule.[24] As between what appeared to be the old historic English rule and a Roman intruder, the court did not hesitate. Just as in Coke's day,[25] lawyers took pride in the common law as an indigenous system, in competition with the Roman law, and the existence of a common-law rule was its own justification.[26]

Another instructive case for our present purpose is afforded by the law as to gifts of movables *inter vivos*. In the Roman law according to the *ius civile* title might be transferred by formal conveyance (*mancipatio*), and in that case no delivery was necessary. Or there might be delivery, in which case, if the subject of the gift was *res mancipi* possession for one year (*usucapio*) would transfer title. Until that period had elapsed, whether there was gift or sale, the title remained where it was prior to delivery. If, however, the subject of the gift was *res nec mancipi*, title passed by delivery (*traditio*) in any lawful transaction. There was also a third possibility. Without transfer of title, the donor might promise gratuitously to transfer the subject of the gift to the donee. If this was done by formal contract (*stipulatio*) the obligation was enforce-

[24] "We in England have long ago committed ourselves to the principle that, within limits to be settled by the House of Lords and Court of Appeal, uncertainty in the law is a worse evil than unreasonableness, and judges of first instance must continue 'falsely true' to the errors — if they are such — of their predecessors." Note in 24 L. QUART. REV. 117. "It is generally more important that the rule of law should be settled than that it should be theoretically correct." Lord Cottenham in Lozon *v.* Pryse, 4 My. & Cr. 600, 617 (1840). "It must be remembered that the rules which govern the transmission of property are the creatures of positive law, and that when once established and recognized, their justice or injustice in the abstract is of less importance to the community than that the rules themselves shall be constant and invariable." Lord Westbury in Ralston *v.* Hamilton, 4 Macq. 397, 405 (1862). "Uncertainty is the gravest defect to which a law can be exposed, and must at whatever cost be avoided." HEARN, THEORY OF LEGAL DUTIES AND RIGHTS, 43.

[25] *E. g.*, the remarks as to LITTLETON'S TENURES in the preface to COKE ON LITTLETON and in the preface to 12 REP.

[26] Cochrane *v.* Moore, 25 Q. B. D. 57 (1890). See DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, 171 *ff.*

able by a condiction, which lay for *certa pecunia* or *certa res* due upon contract.[27] For the Romans enforced such an obligation through a claim of the promisee to the very thing promised, exactly as in our law we once allowed debt for a horse due upon an exchange of horses.[28] In each case the action preserves the memory of a time before the use of coined money when the promisor, typically a borrower, was thought of as one who wrongfully detained the creditor's property, although it might be property of a pecuniary character, so that return of an equivalent would suffice. But just as in debt for a chattel, or detinue, as it came to be, the plaintiff might have to be content with the money value of the thing, since his execution ran in the alternative, so under the Roman formulary procedure, unless the judgment debtor handed over the thing itself, there was ultimately a *pecuniaria condemnatio*.[29] Only a formal contract was so enforced.[30] Yet there was an obvious similarity between the gift without delivery and the gratuitous creation of an obligation to do or pay something. Hence it was easy to think of a contract of gift.[31] And as, on the one hand, the formal contracts lost their vitality and, on the other hand, the clumsy device of *actiones arbitrariae* was superseded by execution *in natura* (specific enforcement), the distinction between gift as a transfer of title and an agreement to give as the creating of an enforceable duty to transfer, was easily lost. As the enforcement *in specie* of the duty of the seller to transfer gave rise to a rule that the risk of loss was on the buyer, the thing sold being treated as part of his substance from the date of the sale regardless of delivery,[32] so specific enforcement of the contractual duty of the donor gave rise to an idea that the gift was complete upon acceptance, without more. The law of Justinian required no form. The *pactum donationis* was legally enforceable by compelling delivery, and so it could be said that the gift was complete without delivery.[33] The Roman

[27] A brief account of this may be found in ROBY, ROMAN PRIVATE LAW, I, 527–28. As to the *condictio certi*, see DIG. XLV, 1, 74; DIG. XII, 1, 24.

[28] FITZHERBERT, NATURA BREVIUM, 119, I.

[29] GAIUS, IV, §§ 48–52.

[30] VAT. FRAGM. § 263.

[31] COD. V, 11, 6. See WINDSCHEID, PANDEKTEN, II, § 365.

[32] DIG. XVIII, 6, 8, pr.; DIG. XLVII, 2, 14; INST. III, 23, § 3.

[33] "Moreover they are complete when the donor has manifested his will in writing or without writing; and our constitution, after the example of a sale, has directed that

law world has received this doctrine from Justinian's books.[34] But the great Romanist generalization of the legal transaction (*Rechtsgeschäft, acte juridique*) — the declared will to bring about a legal result, given effect by the law — has led to a new way of treating it. In the Institutes, gift appears as a mode of acquiring title to property. In recent systematic works it appears among obligations.[35] Systematic writers indeed confess that so regarded it does not fit neatly into the general legal scheme. But this is of little moment under a legal system by which one who has a contract right to property is as assured of getting it *in specie* as is one who has title, or, to put it in the language of our law, the equitable title is as good as a legal title.

At common law the question was first definitely decided in *Irons* v. *Smallpiece* (1819).[36] The action was trover for two colts. The plaintiff (donee) was the son of the donor and defendant was the donor's executrix and residuary legatee. Six months before the donor's death he orally gave the colts to plaintiff, but they remained in the donor's possession till his death. It appeared, however, that the donee agreed to pay a stipulated price for the hay furnished the colts after the gift. Thus on the one hand the gift so near in time to the donor's death had a certain testamentary flavor, on the other hand, the agreement to pay for the hay amounted to an acceptance of the gift, and if a legal transaction of oral gift and acceptance were to be recognized by the law as having the effect of passing title, there was enough. The Court of King's Bench took the view that property did not pass. Abbott, C. J., relied on the undoubted rule requiring delivery in case of gifts *causa mortis*, which he said could not be distinguished. Holroyd, J., said that "to change the property by a gift of this description [*i. e.* without deed] there must be a change of possession." But Lord Hardwicke had expressed a doubt whether the analogy of gifts *causa mortis* was applicable,[37] and after *Irons* v. *Smallpiece* many judges in-

they involve a duty of making delivery, so that although there has been no delivery, they have full and perfect effect and the donor is under a duty of making delivery." INST. II, 7, § 2. Compare conversion by contract in the Anglo-American law as to vendor and purchaser of land.

[34] FRENCH CIVIL CODE, Art. 938; BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL (11 ed.), III, §§ 803–06; SCHUSTER, PRINCIPLES OF GERMAN CIVIL LAW, §§ 199–200.

[35] See DERNBURG, PANDEKTEN (8 ed.), II, § 363, note 2.

[36] 2 B. & Ald. 551. [37] Ward *v.* Turner, 2 Ves. Sr. 431, 442 (1752).

sisted *arguendo* that a clear distinction between gifts *inter vivos* and gifts *causa mortis* ran through the books and had been ignored in that case.[38] It was argued that "the question to be determined is not whether there has been an actual handing over of the property manually, but whether . . . there has or has not been a clear intention expressed on the part of the donor to give and a clear intention on the part of the recipient to receive and act upon such gift." [39] It was said that retention of possession could only be evidentiary upon the real question as to intention.[40] It was said that in case of a gift *causa mortis* there was a reason for requiring some formal act, whereas in case of a gift *inter vivos* it was enough that "the conduct of the parties should show that the ownership of the chattel has been changed." [41]

After controversy had raged for seventy years or more, some approving the doctrine of *Irons* v. *Smallpiece*,[42] but more disapproving it, the matter was set at rest in *Cochrane* v. *Moore*.[43] Now the historical method was at the height of its vogue. Accordingly the elaborate opinion of Fry, L. J., proceeds neither upon analogy nor upon analytical reasoning as to the elements of the legal transaction of gift, but upon an elaborate historical investigation, beginning with Bracton and carried down through the Year Books, as a result of which he concludes that "according to the old law no gift or grant of a chattel was effectual to pass it whether by parol or by deed, and whether with or without consideration unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of deeds and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery." [44] The resulting rule, requiring delivery in case of gifts *inter vivos*, has been generally accepted.

Looking back over the development of the divergent doctrines of the civil law and of our own law upon the two subjects discussed,

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[38] Crompton, J., in Winter *v.* Winter, 4 L. T. (N. S.) 639, 640 (1861). See Serjt. Manning's note (*a*), 2 M. & G. 691 (1841).

[39] Pollock, B., in *Re* Harcourt, 31 WKLY. REP. 578, 580 (1883).

[40] Cave, J., in *Re* Ridgway, 15 Q. B. D. 447 449 (1885).

[41] Crompton, J., in Winter *v.* Winter, *supra*.

[42] Kelley, C. B., in Douglas *v.* Douglas, 22 L. T. (N. S.) 127, 129 (1869). *Contra*, Parke, B., in Ward *v.* Audland, 16 M. & W. 862, 870 (1847), and Oulds *v.* Harrison, 10 Exch. 572, 575 (1854).

[43] 25 Q. B. D. 57 (1890).

[44] *Id.* 72–73.

we may see five different processes by which legal rules have been worked out juristically and judicially in the past. The first and crudest is a method of eking out binding authority by differences and analogies, illustrated by the common-law adjudication of the question of ownership of border trees on the analogy of seisin of the trunk, by the controversy as to the analogy of gifts *causa mortis* and gifts *inter vivos* in the English cases, and by the Roman rule that no delivery is necessary in case of gifts *inter vivos*, rested in the Institutes on the analogy of a sale.[45] The second is generalization from procedure, illustrated by the Roman-law doctrine of gift *inter vivos* without delivery as an inference from specific enforcement of a *pactum donationis* and the common-law doctrine of gift by deed without delivery as an inference from the procedural force of a seal in estoppel by deed. Out of these two develop the scientific method of systematic analysis, illustrated in the civil law by the theory of a gift as a legal transaction, in which the declared will to give and to accept is given effect as such, without more, and in the common law by the theory of gift as made up of the elements of declared intention to give plus manifested intention to accept, a theory obviously related to the Romanized conception of obligations which had no little currency in nineteenth-century England. It should be noted in passing that although this theory did not establish itself in the case of gifts *inter vivos*, it has left its mark in the rule as to gratuitous declarations of trust without transmutation of possession, so that "I give" and "I accept" are nugatory without delivery, and "I promise to give" and "I accept" are nugatory without consideration, while "I hold in trust for you" is good upon the sole basis of intention without anything more.[46]

A fourth method disclosed is historical. The history of legal institutions and legal doctrines is relied upon to give us a conception or a principle from which the rule for a particular situation may be reached. This is illustrated by the decision in *Cochrane* v. *Moore*. Lastly, we see a philosophical method, a method of deduction from some extra-legal philosophical principle, illustrated in Roman law by the doctrine as to border trees, derived from Aristotelian metaphysics and Artistotelian natural philosophy, and

[45] See *supra*, note 33.

[46] *Ex parte* Pye, 18 Ves. 140, 150 (1811). See the concise statement of these distinctions in WILLIAMS, PERSONAL PROPERTY (17 ed.), 70.

the civil-law doctrine of gift as a legal transaction, based ultimately in part on analysis and in part on philosophical theories of the intrinsic binding force of promises, fortified by nineteenth-century philosophical theories as to free assertion of the individual will. In short, instead of the conscious or subconscious search for or formulation of the practice of the people, or of what seemed naturally just to the lay public, or the inexorable operation of the self interest of a dominant class, which have been pictured to us, we see the gradual development of a scientific technique, designed to preclude vague gropings for extra-legal ideas of the naturally just, which vary with the impulse of the moment or the character of the magistrate, and to repress the pressure of individual or class self-interest by imposing objective standards of finding, interpreting and applying the law. Beginning by imposition of a hard and fast yoke of authoritative rule, literally interpreted and mechanically applied, men learn to eke out authority by distinctions and analogies and presently to generalize cautiously from established remedies and established procedure. Later they learn to use three truly scientific methods — the analytical, the historical and the philosophical. Under our eyes they are beginning to learn a further method of taking account of the social environment of the application of legal rules, of their social effects in action, of the interests to be secured and the effective means of securing them. The significant feature of this scientific development is not the occasional failure to keep down the eternal pressure of self-interest, but rather the success which has attended centuries of persistent human effort to overcome instinctive action and put in its place conscious direction of the human will toward an ideal justice.

Law is a practical matter. Legal traditions have persisted largely because it is less wasteful to keep to old settled paths than to lay out new ones. If one were laying out streets anew in the older portion of one of our modern cities that dates back to colonial times, and were proceeding solely on the basis of convenience of travel from place to place, proper accommodation for use of the streets by public utilities and light and air for the buildings that now rise on each side, we may be sure that the map would look very different. Often the streets got their form by chance. They were laid out at the fancy of this man or that according to his ideas for the moment, or, laid out by no one, they followed the lines of travel

as determined by the exigencies of the first traveler. Today it may well be more wasteful to relay these lines than to put up with the inconvenience of narrow, crooked, irregular ways. Many legal paths, laid out in the same way are kept to for the same reason. When the first case on the new point called for decision, judge or jurist, seeking to decide in accordance with reason, turned to a staple legal analogy or to an accepted philosophical conception and started the legal tradition in a course which it has followed ever since. Thus the really universal truth in the economic interpretation is to be found in a conception of law as a social device to eliminate friction and to prevent waste; as one of the means by which civilization conserves energy and conserves the goods of existence to meet human wants.

But the great source of friction is human wilfulness[47] and the great cause of waste is insecurity. Hence throughout legal history men have been solicitous above all things to hold down arbitrary and capricious action, whether of private individuals or of magistrates, and to conserve the general security. Undoubtedly magisterial arbitrariness has sometimes been a bogie. Aristotle feared to allow recovery of eighteen *minae* proved due in an action for twenty *minae* lest to permit the dikasts to do anything but decide the formal issue might turn orderly legal adjudication into mere haphazard arbitration.[48] Scaevola thought it required a strong judge to allow a set-off.[49] The English Serjeant at Law who replied to Doctor and Student objected to injunctions against enforcement of a bond paid but not formally released "for as moch as conscience is a thinge of greate uncertaintie."[50] Selden thought the measure of equity might quite as well be the chancellor's foot.[51] Jefferson would have received English law as of the first year of George III, in order to "get rid of Mansfield's innovations" in the way of absorbing equity and the law merchant into the common law.[52] Thus the paramount social interest in the general security

[47] "Man . . . just in his intelligence and perverse in his will." DEMAISTRE, DU PAPE, Bk. 2, chap. 1.

[48] POLITICS, II, 8 (Jowett's translation, I, 48–49).

[49] CICERO, DE OFFICIIS, III, 17, § 70.

[50] HARGRAVE, LAW TRACTS, 326.

[51] TABLE TALK, tit. Equity.

[52] TYLER, LETTERS AND TIMES OF THE TYLERS, I, 265. Compare the quotations in note 24, *supra*.

has dictated orderliness, certainty, system and rule in the administration of justice so that men may rely on appearances and act with assurance in their everyday activities unworried by the aggressions of others and unharassed by the caprice of their rulers. The intense desire to exclude the personality of the magistrate for the time being at almost any cost has left its mark on the law beyond any other factor in law making.

Primitive law sought to insure that one will should not be subjected arbitrarily to the will of another by reliance upon chance. The strict law relied instead upon hard and fast rule, upon form and upon mechanical procedure. Equity and natural law relied rather upon reason and an attempt to identify law and morals at a time when philosophical or religious systems of morals were generally accepted and appeared to furnish universal standards. The maturity of law turned to logical development of conceptions derived from supposed ultimate metaphysical data, at a time when men believed in the absolute, or to logical deduction from principles derived from history, under the influence of positivist views derived from the analogy of scientific study of external nature. So far from being means of allowing popular ideas of natural justice to play freely upon the magistrate's conscience or to enable him to formulate effectively the postulates of the self-interest of a dominant class, these were all conscious devices to enable him to resist himself and his fellows and conscious attempts to attain an absolute objective standard of justice.

A prime cause of difficulty in all discussions of this subject grows out of the mistake of thinking of a body of developed law as wholly made up of rules. Austin was a chancery barrister at a time when English equity was chiefly taken up with the enforcement of family settlements and trusts, and the equity lawyer was of necessity an expert in the law of real property. Hence he thought of law largely in terms of rules of the law of property. This attitude has undoubtedly colored Anglo-American analytical jurisprudence ever since.[53] Moreover lay writers who have urged the economic

[53] Thus, MARKBY, ELEMENTS OF LAW, § 7 (1871), defines law as a "body of rules;" HOLLAND, JURISPRUDENCE, chap. 3 (1880), defines a law as "a general rule of human action" and, after BENTHAM (WORKS (Bowring ed.), I, 141) takes law to be an aggregate of such laws; ANSON, LAW AND CUSTOM OF THE CONSTITUTION, I, 8 (1886), speaks of law as made up of "rules of conduct;" POLLOCK, FIRST BOOK OF JURISPRUDENCE, 17 (1896), defines law as "the sum of the rules of justice administered in a state."

interpretation in various forms have thought of law in terms of penal legislation and have assumed that it is a body of definitely fixed rules imposed by a definite authority.[54] Primitive law may show us a hard and fast rule for every case with a tariff of exactly fixed compositions for every cognizable species of wrong. But in its maturity law is much more complex. In truth, developed law exhibits three types. First we find rules, such as Austin wrote of, *e. g.*, the rule in Shelley's Case, the rule against perpetuities, the rules as to when and what covenants will run with the land, the rules as to what is a negotiable instrument, how it may be transferred and the effect of different modes of transfer, and the sections of a penal code.[55] The advocate of the economic interpretation goes to the latter for illustrations. Second, we find standards, such as the standard of due care or of the diligence of a reasonable man, the standard of the reasonable man in the objective view of fraud, duress and mistake, the standard of reasonable service in the law of public utilities; or in the Roman law of contracts the standard of *diligentia quam suis*, of *diligentia cuiusvis hominis*, of *diligentia boni et diligentis patrisfamilias*. We have sometimes been told that these are not law at all.[56] And they are not if we think of law as an aggregate of rules. The rule, so we are told, is that a certain standard be applied to certain situations. These standards have a variable application with time and place, and contain a large moral element. Yet they are significant legal institutions. The legally defined measure of conduct, applied by or under the direction of a tribunal is as much a part of the machinery by which organized society secures interests as the precise rules which it uses for the same purpose in other situations.[57] It is here that Judge Baldwin's proposition as to the practice of the people and popular ideas of what is naturally just finds its justification. For the cardinal notion is one of protecting the public at large in a reasonable re-

[54] See my discussion of this subject in 25 HARV. L. REV. 162, 167, 500.

[55] Compare the common-law principle as to what is a misdemeanor with the rules in our penal codes.

[56] Hence the attempt, now generally given over, to establish a body of fixed rules that this or that thing — *e. g.*, not stopping, looking or listening at a railroad crossing, getting on or getting off a railroad car when in motion — is negligence absolutely in and of itself without reference to circumstances. Hence also the attempts to fix degrees of care or degrees of negligence. Compare also KEENER, QUASI CONTRACTS, 104–07.

[57] See HOLMES, COMMON LAW, Lect. 3.

liance on the way in which others will conduct themselves in this situation or that, as a means of promoting the general security. Third, we have what may be called principles, that is premises for juristic deduction, to which we turn to supply new rules, to interpret old ones, to meet new situations, to measure the scope and application of rules and standards, and to reconcile them when they conflict. These principles are the living part of the legal system and are its most significant institution. Here also the hand of the jurist and the work of legal speculation are most conspicuous.

Examples of such principles or general premises of the legal system are the Roman conception of *negotia bonae fidei*, resulting in a relation or obligation with incidental duties of good faith on each side, quite apart from what had been expressed; the modern civilian conception of the legal transaction, the declared intention given effect as such by law in order to effectuate the will of the actor; the principle that one person is not to be enriched unjustly at the expense of another; the doctrine that a loss is not to be shifted from one innocent person to another equally innocent, which plays so large a part in Anglo-American equity; the principle that liability is a corollary of fault, which was so fruitful in our nineteenth-century law of torts, and the more recent principle that harm intentionally caused is actionable unless justified. Some of these make their way in the law and become permanent acquisitions of the system of administering justice. Some prove ephemeral. Some for a season do positive harm before they are rejected. In any event these general principles and conceptions, through which jurists endeavor to make the law as it has developed logical and intelligible, react powerfully upon the law itself and have much to do with shaping its course. Thus the generalization that liability to repair an injury is a corollary of culpability has had much to do with departures from and limitations of historical common-law rules as to absolute liability of carriers and absolute liability of keepers of animals, and with the attitude of American courts toward the doctrine of *Rylands* v. *Fletcher*. And the principle that intentional injury must be justified has been molding the whole chapter as to injuries to advantageous relations which the courts have been writing in the last generation.

William James tells us that "the course of history is nothing but the story of men's struggle from generation to generation to find

the more inclusive order." [58] Certainly such has been the course of the history of legal doctrine. But here, too, the endeavor has been to prevent friction and eliminate waste. In law this means an endeavor to eliminate the arbitrary and illogical; a conscious quest for the broad principle that will do the work of securing the most interests with the least sacrifice of other interests, and at the same time conserve judicial effort by flowing logically from or logically according with and fitting into the legal system as a whole.

Roscoe Pound.

HARVARD LAW SCHOOL.

[58] THE WILL TO BELIEVE, 196.

THE WORLD WAR AND ITS EFFECT ON FUTURE PRIVATE INTERNATIONAL LAW. II

II. The Condition of Foreigners

THE ideas which I have expressed about restrictions upon associations in their international relations indicate the nature of my opinion on the restrictions which in the future should be imposed by each nation upon foreigners.

Under the influence of philanthropic theories professed by French philosophers in the eighteenth century and for more than a hundred years, most lawmaking has had a tendency to suppress the difference which used to exist in each state between its subjects and persons who were not subjects. Particular instances are the Dutch Civil Code of 1836 and the Italian Civil Code, which in a general way class foreigners with citizens save for the single exception of political rights. The Institute of International Law made itself the mouthpiece of this liberal tendency when at Oxford in 1888 it passed a famous resolution saying that in all countries the rule should be: "The foreigner, no matter what his nationality or religion, shall have the same civil rights as the citizen."

These generous aspirations are difficult to maintain in the presence of the lesson drawn from actual events. The latter have shown that there are distinctions which must be established between the guests of a nation welcomed in its territory, that there are some such guests of a nation whose business constitutes a most serious danger, and that it is therefore imprudent to make all foreigners without exception equal in law to citizens.

Italy is a country which has for a long time professed and applied the most favorable theories toward foreigners. Moreover, it is interested in welcoming them as kindly as possible, because the money of tourists is perhaps the most important part of its revenue. But taught by the most painful lessons, and enlightened by the war, Italian public opinion has come to understand that a people may not safely let the representatives of another nation install themselves in great number, acquire houses, country estates, and

mines, and grasp, openly or secretly, its commerce, its industry, its shipping companies, and worst of all, its banks.

The cry of alarm from Italy found its voice through two eminent professors of law, Fedozzi [1] and Giovene.[2] There is no doubt that these sentiments will be echoed and that important legislation will result from it, like that which came twice in France from similar circumstances. The first was when during the drafting of the Civil Code certain articles [3] were put into it which marked a profound reaction against the too great liberality of the Revolution, and the second, when in 1849 the government of the Second French Republic found that it had to revoke its own decisions in favor of internationalism and set up against foreigners who had abused its favor procedure for their expulsion.

The experience of all times and all countries shows that it is extremely dangerous for a state to give too much liberality to foreigners who come within its boundaries. Sooner or later the fatal day comes when such imprudence is regretted, and the two phrases of La Fontaine's Fables are brought to mind:

> "*Laissez-leur prendre un pied chez vous,*
> *Ils en auront bientôt pris quatre.*" [4]

In a general way, lessons of experience and common sense both indicate that the differences between citizens and foreigners are necessary and inextinguishable. The law must take them into account, no matter what the theories of doctrinaires and Utopians.

In every country citizens can be kept in the right way by moral considerations much more forcibly than by the fear of punishment through the law. While one may hope to escape the consequences of the law, it is difficult to avoid the reproaches of one's relatives and friends, or to be surrounded by fellow citizens who do not trust one. Living in the place where one is born or has always lived, one must always hesitate before making trouble. No similar sentiment affects foreigners. None of these moral barriers hold them back when they start on the road to crime. And thus it

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[1] 18 REVUE SCIENTIA DE ROME, 419 (1915).

[2] 15 RIVISTA DI DIRITTO COMMERCIALE, 657 (1917). See also Bartolo Balotti NUOVA AUTOLOGIA (May 1, 1917), 80.

[3] Articles 11, 14, 18, 726, 912.

[4] LA FONTAINE, LA LICE ET SA COMPAGNE, Livre II, 7.

follows, and statistics prove, that among criminals the proportion of foreigners is always considerable. The same is true of prostitutes.

This sociological phenomenon may also be explained by other causes. The man who abandons his native soil to plant himself somewhere else is often one of those restless spirits satisfied by nothing, desirous to start some revolution against social institutions and to bring them into accord with his dreams. Often such a man is also a criminal, a bankrupt, or a deserter.

Hence it is not astonishing that these individuals, who have shown in their own country that they are incapable of obedience to authority, or of discipline, should carry away with them a spirit of insubordination and revolt. Even when they do not commit common and ordinary crime they find it easy to stir up mutiny, strikes, revolutions, and whenever the public peace is disturbed they take occasion to make it worse.

In order to deal with the menace of these dangers the government of Great Britain, theretofore celebrated among anarchists for its liberality and its hospitality, was forced to pass in 1905 its famous Aliens Act, which gave the necessary power to prevent dangerous foreigners from access to the country and to expel them if necessary.

No one should believe that I consider all foreigners as dangerous. My thought is quite otherwise. I simply say that among them there are always many who are disposed to join the army of criminals. But I also say that even those whose conduct is not opposed to the penal law should be the object of particular measures. We ought to remember that the more honest men are and the more they understand the duties of a good citizen, the less likely they will be to forget their obligation to their native land, merely because they have emigrated. We should infer that there is just cause to believe that they will help their own country by spying. It may be merely commercial and industrial. And many things of this kind have turned up both before and during the present war.

Before the war broke out there were many proprietors of hotels and restaurants, many servants, employees of business houses, workmen, even merchants, professors, and students, who abused the hospitality of the country where they were residing, to get every kind of information and every kind of secret to be put to some use in their native land. But even if they do not do this sort of thing

we ought to fear that any great number of foreigners would, by their presence alone, inevitably affect the traditions, habits, and virtues of the population with which they mix. A Swiss writer, taught by what has been passing before his eyes, expressed this thing profoundly in a single phrase when he said: "Foreigners are a denationalizing force." [5] This work of denationalizing is particularly to be feared in any nation which has been as rash as Switzerland or the United States. In those countries foreign professors are trusted to instruct the young. Whether it be children, more mature students, or even those in universities, the danger is the same. If the teacher does his work well he will be a man who cannot forget his native land. He will, therefore, teach ideas which are not those of the fathers and mothers of his students. These ideas will, in their turn, be a ferment causing denationalization.

We should then exclude entirely from our consideration the theory of jurists like Pillet and Rolin, who say that every foreigner should have, merely because he is a man, a legal right to enter every social and legal institution. We should, however, remind ourselves that every state has for its first cause of existence the interest of its citizens. Working from this idea we should declare that foreigners should receive every right which humanity demands for them, but that their rights should stop short of the point where native citizens begin to suffer. It is citizens who pay taxes and serve as soldiers; it is for them and through them that the state is organized. It necessarily follows and is the only just result that they should have advantages from which others should be excluded.

These considerations ought to inspire legislatures and govern in the future the condition of foreigners. Under such rules foreigners in every country will necessarily be more rigorously supervised in the future. There is more than one reason for this. Long before the war the thing had begun by reason of the inconvenience caused by the presence of certain foreigners, and legislation had begun to subject them to special rules. I have already cited the British Aliens Act. The world is familiar with the successive laws through which the United States of America has protected its population against the disagreeable results of immigration. In France for many years every man from every nation has had the most absolute

[5] Cernesson, REVUE DE PARIS (August 1, 1914), 530.

liberty. There has been but one distinction: the foreigner could be expelled. But the day finally came when our guests abused our hospitality. Some thirty years ago the behavior of the anarchists called our attention to the fact that both the authors and the inciters of acts of anarchy were generally foreigners. Then the decree of October 2, 1888, followed by the law of August 8, 1893, required foreigners residing in France to make a declaration to the police authorities and to carry papers which should be *visé*, in the commune to which they moved, each time that they changed their residence.

The war has shown that this was insufficient. Hence the decree of April 2, 1917, which requires every foreigner who remains more than fifteen days in France to receive a permit to remain, describing his person and carrying his photograph. In the United States the authorities have taken even greater precautions. Having used the Bertillon system to identify criminals they have completed the permits issued to German residents requiring on each the thumb print of the bearer. This is a wise course. Berlin had learned how to substitute one photograph for another on a passport, even when the first was impressed with a stamp.[6]

Doubtless after peace comes these measures will not be so strict. But in a general way they will probably continue, in view of the hard experience we have had. And that experience will probably lead to other measures interesting in private law. Some countries will forbid foreigners to own land or buildings. I think this interdict, which may already be found in certain countries, is not a wise thing. It is likely to drive foreigners out of fields of enterprise in which they might otherwise engage to the benefit of the country in question. On the other hand, it is of little value as a precaution. The foreigner who really has some dangerous scheme in his mind can accomplish it without much difficulty, either by leasing the thing he is forbidden to buy, or having it bought by a man of straw. The furthest I would go in this case would be to say that foreigners, as I have proposed in the case of foreign associations, should be forbidden to buy real property situated in places of military importance. Even such precautions are likely to be dodged without very much trouble by any skillful and unscrupulous person.

[6] 23 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC (1916).

If we are to work along this line it would be much more practical to forbid foreigners to engage in public service or affairs which affect directly or indirectly the national defense. The laws of many countries require that the captain and officers of every ship shall be citizens. Others make the same regulations for railroad work. It is probable that the present experience will lead to the imitation of these examples.

For the same reason every public function ought to be prohibited to foreigners. As I write this I have received a profound shock upon learning that the mayor of an American city is an unnaturalized German.[7]

I prefer the wiser French law, which absolutely refuses every kind of public function to foreigners. They may not become members of the bar. And that is reasonable, for the influence of a lawyer may be most considerable, and he is a man likely to be trusted with secrets of great importance. Lawyers ought to be held up in their respect toward the duties of their profession by the very same moral considerations of which I have spoken above and which are always more forcible in the case of native citizens.[8]

The next question is whether other restrictions are needed upon the rights to be granted to and enjoyed by foreigners. I say no. As I have already observed, the more reasonable we think it is to take measures against dangerous foreign influences, the more we see how reasonable it is and how economically necessary that we should not put up barriers like the Great Wall of China which would block off ordinary international relations. That sort of thing is both disagreeable and injurious to the very people whom it seeks to protect.

Beyond all these matters there is a whole series of new problems which have been brought before jurists because of the progress of scientists. These arise out of those scientific inventions which the war has turned from theory to practice. The application and development of such things go far beyond the dreams of romance. Thus, when peace comes again between nations, even when it is more complete than it ever was before, we must profit by the

[7] The American newspapers have published the fact that a suit was brought in the District Court of Indianapolis to prevent a German named Fred C. Miller from assuming office, January 7, 1918, as the Mayor of Michigan City.

[8] See, on this subject, my MANUAL, § 333.

lessons of war and regulate severely aërial navigation, wireless telegraphy, and submarines, including those for commercial purposes. Here we have questions which interest both public and private international law, questions of the greater interest because of the difficulty of any present solution. Yet as none of them can be seriously studied unless we begin with research and meditation, I can merely announce the problems.

III. Conflict of Laws

It is usual to employ the expression "conflict of laws" to indicate the cases in which it is necessary to decide whether a legal relation is to be governed by the law of the country in which the question arises or by the law of some other country. This phrase has been deservedly criticized. Literally understood it would make one believe that in cases of this sort two laws engaged in a controversy, each one possessing the same authority and the judge intervening, like a sort of arbiter, to award the victory. Truly there are jurists who conceive of things in this light, but I am one of those who consider it a most inexact conception. In reality in every country there is but one law, its own. Nevertheless there are cases in which that law may declare that on particular points the rules to be followed are those enacted by a foreign legislature. This may arise from reasons of practical utility, of courtesy toward other nations, or of plain justice. When this happens there is no conflict between the local law and the foreign law. The first borrows from the arrangements made by the second. If I may make a somewhat trivial comparison, it is as if a host inviting strangers to his table should think himself bound to serve up to them dishes prepared according to the usage of their own country, not because he is bound to do this, but to be agreeable to them, or perhaps to conserve their health.

The expression "conflict of laws" is therefore inexact. But it is most useful, and it has not been possible up to the present time to find another which denotes under so brief a phrase the case in which the presence of a foreign element in a legal relation may require the application to this relation of some foreign rule. Thus it is improbable that any transformation of judicial theory, such as present events may bring forth, will carry with it any abandon-

ment of this expression and, conforming to common usage, I shall continue to make it serve me.

But even if this expression is likely to continue to be honored, nevertheless there is reason to think that the problem which it expresses will receive new and different solutions, after the general peace, very different from those which have been given to it in the past.

At first sight this suggestion is a surprising one. How can one suppose that a gigantic battle, such as we now witness, can exercise any influence whatsoever on the conflict of private laws when that conflict, as has just been said, is not a real controversy? Once peaceful relations have been restored between those states now at war, why should not the inter-relation of their citizens be governed by the same rules as in the past? To this I answer: The actual war has rolled forward under atrocious conditions. It will leave profound and painful marks on the souls of millions of men and women who have suffered through it. These are people who were confident in the theory inspired by Rousseau,[9] a theory admitted and taught in all continental Europe. They had been led to believe that if war should break out the evils which follow in its train would touch civilians only indirectly and, as it were, by rebound. All the world knows that there has been nothing of this sort. Following on the German brutality, great populations have been forced to undergo physical and moral suffering a hundred times worse than that of the soldiers. The national dignity of the Belgians has seen their territory invaded by one of the guarantors of their neutrality. Their goods have been sacked and pillaged; they have suffered in their most dear affections by the massacre of so many innocent victims, by so much rapine and sacrilege that an honest pen cannot describe it. They have suffered by having all their youth shackled in a most degrading physical slavery. Can one then believe that they will be in a hurry to forget the authors of such evils?

And the English: Will they not remember, when peace comes, the women and children whose death has been the subject of

[9] "*La guerre n'est point une relation d'homme à homme, mais une relation d'État à État, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats.*" (CONTRAT SOCIAL, Livre I, chap. 4.)

celebrations and public rejoicings? Can they forget the enthusiasm with which Germany welcomed the exploits of its submarines against passenger steamers and those of its Zeppelins against unfortified towns? How many years will Serbia need to get back to normal life? And there is France, which wanted nothing but peace, which had lulled itself to sleep with generous ideas of international fraternity. Can France ever forget the attempt on her very life? Can she forget the millions of her men folk who have been sacrificed to save her from destruction? Above all, can she forget the stupid barbarity directed against her most respected monuments, her most feeble and frail beings, her greatest artistic glory, and against the apple trees which adorned her gardens?

Peace will come. At some time it must come, but at the bottom of hearts hate will remain. It will be a long time before Turks, Germans, Austrians, and Bulgarians can make themselves tolerable as visitors to the victim nations.

The legislation which in all countries reflects the current of popular opinion will feel a fatal necessity to follow its tendencies. Laws and decisions will accentuate the differences which exist today between citizens and foreigners; on the other hand treaties will diminish these same differences in the relations among the Allies.

Can it be possible that in the future the German will receive in France the same rights and privileges as an Englishman or an American? I have spoken of this above, but I now return to the question to point out a consequence which follows from it when we consider the future rules about conflict of laws.

From the time of Bartolus everyone has admitted that cases exist in which the law governing a legal relation is the personal law of the individuals who are interested. But when we begin to give precision to the idea of personal law, discord breaks out between systems of legislation. Some, faithful to the ancient theory of *statuts*, consider the personal law of an individual to be that of his domicile. This is especially true in England and in the United States. Other systems take their inspiration from the principle laid down by article 3, section 3, of the *Code Napoléon*, and apply to each individual the law of his nation. Most of continental Europe has adopted the French rule.

The progressive extension of this second theory is an argument

in favor of its merit. In particular, this theory has the advantage of being easier to apply with precision than the older one.[10]

And even in internal relations it is not always easy to give precision to domicile. Often and especially in our time where people move about according to their occupations, their caprice, or even the weather, it may well be embarrassing to decide what country is the principal residence of the person with whom one is dealing. Moreover an individual may often change his domicile easily and without leaving any clear evidence of what he has done.[11]

On the contrary, it is generally easy to be sure of the nationality of an individual. In the future it will be even simpler if, as I have thought likely, the law of most countries will require more and more evidence from the foreigner. It is probable that he will be required to make a declaration to the local authorieties and to receive a permit to remain, which declares his nationality. Further, all contests about the nationality of individuals, no matter how frequent we may think they are likely to be, are in reality the reverse of frequent if we consider how many millions of individuals have a nationality not open to dispute. And finally, the number of those who change their nationality is relatively unimportant. Even among those the change is accomplished in practically every case by formalities which give it sufficient publicity.

But from now on it seems to me we shall have one further reason for preferring nationality to domicile. As I have said, we cannot possibly treat a German, after this war, in England or America, as if he were a citizen. It will not be enough that he is domiciled there. We cannot even treat him like an ordinary foreigner. By reason of his nation we shall subject him to certain special police measures and we shall refuse him certain rights. Now if, in the future, law draws this distinction, must it not also be prepared to

[10] Mr. T. Baty has published an interesting and original work under the title of POLARIZED LAW (1914). He has endeavored to prove that the rule of domicile is superior to that of nationality (pages 18 *ff.*). But the cases which he cites to support this thesis [Mette *v.* Mette, 1 S. & T. 416 (1859); Ogden *v.* Ogden, [1908] P. 46; and Sussex Peerage Case, Cl. & F. 85 (1844)] are really against it. They indicate that the application of the law of domicile causes difficulties and injustice which would not be produced by the law of nationality.

[11] I may further add that since systems of legislation do not agree upon the determination of domicile, a person is likely to be considered by an English court as domiciled in France when the French court would consider the same person to be domiciled in England. See my MANUAL, § 114.

take nationality adequately into account when it starts to determine the manner in which this German may exercise such rights as are granted to him? There would be an evident contradiction if we should consider nationality to know whether a man may acquire one piece of property or another, or sue, or have the benefit of a treaty, and if we should neglect it when we came to determine the conditions to be imposed upon his acquisition of property, his rights in the courts, or his advantages under a treaty. Thus it seems to me that in the nature of things those countries which until now have remained faithful to the idea of domicile will be forced to accept the other theory as put forward by the authors of the *Code Napoléon*, because it is the one which suits modern conditions. Great Britain has already made one step in this direction. Her Trading with the Enemy Statute of 1916 abandons the traditional principle of English law. Before that statute, even in time of war, the question of whether a person was an ally, an enemy, or a neutral depended upon domicile. Now the criterion is nationality. Sir Edward Grey, as Minister of Foreign Affairs, in a letter to the Ambassador of the United States of America explaining this measure says: "The former test of domicile has been shown by experience to be insufficient in view of the conditions under which modern business is done."

And this is true. In our time the nationality of persons has acquired such importance that it must necessarily replace domicile as a test in international relations. Of course it will still be possible to consider domicile in all proper cases. But those will be the exception, and there is every reason to believe that the Anglo-Saxon nations, taught by current experience, will follow the example of the Latin nations. Soon they will have to recognize that nationality is a necessary test and to decide what law to apply to each foreigner according as he is friendly or hostile.

This will be more necessary, and uniformity among nations will also be more necessary if the jurists realize their hope that private international law will make new progress through the conclusion of many international conventions. These conventions are useful only to the citizens and subjects of the states which have made them, and this is just one more reason for the theory of nationality. For everyone who relies on any such convention will have to prove his nationality.

The next thing to consider is whether there is good reason to hope that new international conventions will improve private international law and in what respect the world war is likely to have an influence in this connection. Its principal influence just now flows from the circumstance that many treaties relating to private rights have lost their force with the outbreak of war. This is particularly true of the relations between France and Italy on one side and Germany and Austria on the other side. Are these treaties suspended or did they come to an end? The question is premature and will doubtless be settled in the treaty of peace.

But even if that should not be, I am driven to believe that all those conventions must be considered dead. Germany violated the treaty which guaranteed the neutrality of Belgium. Turkey tore up the Capitulations. The Central Powers trampled under foot all arrangements intended to diminish the horrors of war. What was this but a proclamation of an intention to be free from such engagements? What dupes other nations would be if they should let such enemies choose among conventions and pick those which they like and which are to their advantage! Surely the just and logical course is to declare that all are dead letters.[12]

But that is a secondary question. The principal thing, as I have already said, is to inquire whether civilized states ought to set to work again to establish whole series of conventions like those in force before the war and to govern questions of private international law by such conventions to as great an extent as is possible. I confess that I cannot share the enthusiasm which has been expressed by many international lawyers. Experience ought to have destroyed their illusions. There are so many cases in which the existence of a convention causes more complications instead of solving the questions toward which it is directed.[13] Take the French-Swiss treaty of 1869. It was intended to suppress all conflict of law upon a whole series of questions of civil right and legal comity. But it has given rise to no end of litigation in both countries. This

[12] This opinion has been expressed in Germany by Professor Eltzbacher in his very recent book TOTES UND LEBENDES VÖLKERRECHT (1917). But it should be observed that in the relations between France and Germany the convention relative to the protection of the rights of authors has been respected. 13 REVUE DE DROIT INTERNATIONAL PRIVÉ, 370 (1917).

[13] Compare the just reflections on this subject of Professor Pillet in his book on CONVENTIONS INTERNATIONALES, 9 (1913).

is proved both by the volumes of reports and particularly by the evidence in the *Journal du Droit International Privé.*

This is not all. It is well known that for some time past representatives of the principal nations of continental Europe have met periodically at The Hague to draw up plans for international arrangements. The idea has been to cause a progressive disappearance of conflicts between the laws of the countries which share in these arrangements. Many of these conventions had already been signed. Some had begun to be put into effect. But then (and it was some months before the war), France, which had cordially welcomed the general idea, denounced these treaties, one after another, leaving in effect only the convention upon certain matters of procedure.

The reasons which led the French government to this action are not clearly understood. Probably it was caused by the following considerations. When a convention between two countries regulates the manner in which a right shall be exercised, the result is that each one of these countries deals with a controversy differently, according as it arises in the case of subjects of the other contracting power or arises in the case of other persons. The result is that private individuals, lawyers, and courts are exposed to a dangerous trap; one may easily forget the conventions, and the results of forgetfulness are unpleasant. This inconvenience is particularly serious when one country makes a number of conventions on the same subject with several other foreign nations. Then one must know first whether to apply the law of the country or of the treaty, and beyond that one must know which treaty is to be consulted. And for the latter purpose one must, to act with certainty, determine at his own risk the nationality of the parties.

It is true that this inconvenience is less when a single convention binds a number of nations, as in the case of The Hague Conventions. But then a different sort of inconvenience arises. In order to make a general international arrangement it is necessary that the convention which expresses it shall not be too seriously out of tune with the essential principles of the laws of any one of the contracting parties. When the supernumeraries in a theatre are supplied with costumes, it is not possible to make them fit in each case, since the wearer is likely to change at every performance. One may well expect them to be too large or too small, and we know what a

grotesque result we see on such occasions. The same is true of a legislative text. If it is to be used in several countries it is almost necessarily vague. Then the convention does not give sufficiently definite answers, and the very absence of precision leads to resort to the courts. It brings about the very suits which the convention was to prevent, and it is likely to cause different interpretation of the text in the different countries. Before long things are likely to be in about the same condition as if the treaty had not been made.

A notable example of this is The Hague Convention upon the signification of judicial acts. Although it was redrafted in July, 1905, from its first form of 1896, I may fairly say that even now it scarcely improves the previous conditions and that, on the other hand, it has raised some difficult questions of interpretation.[14]

Another sort of inconvenience is likely to result from these conventions common to several nations. One country is likely to push forward its own judicial system. There is good reason for fearing this, and if it happens the traditional institutions of other countries are likely to be upset, although those institutions are probably the things which fit the historical development and practical needs of those other countries. This would surely have happened if the plan for a uniform law of negotiable instruments had been adopted. The representatives of thirty-two nations worked on this at The Hague for several years, and it would probably have been adopted had it not been for the outbreak of the war. But that would have been a German victory; for this draft was thoroughly permeated with the ideas of German jurists and commercial men, the ideas embodied in German legislation on this subject. Then German merchants would for several years have reaped a very substantial harvest in other countries. Those other countries would have been obliged to go to school to the new order of things, and while they were learning there would have been disorder in their commerce, their industry, and their credit establishments.

Thus, notwithstanding the way in which this draft was expressed by men of theory, practical men in French Chambers of Commerce rightly criticized it, and public opinion, now enlightened upon the dangers and effects of German penetration, should set itself against any revival of this scheme.[15]

[14] See my MANUAL OF PRIVATE INTERNATIONAL LAW, § 539.

[15] For the bibliography, see my MANUAL, § 197.

And lastly, if we have a general treaty relative to the manner in which private rights are to be exercised, one consequence is likely to be that upon certain points the courts of each one of the contracting states will give the language a different interpretation. If this happens, the treaty will multiply difficulties instead of reducing them. There is too much ground to believe that this will happen; if so, the more the countries, the more the international discord.

These are the different reasons which make me think that we ought to give up in the future the making of general international conventions intended to diminish the conflict of laws. That is one of the lessons of the war. But I do not draw the conclusion that we ought to give up dealing with the questions of private international law.

Certain sorts of conventions about them will still be desirable means of solving questions which can only be dealt with by agreement between nations. One of these questions is the determination of the rights which will reciprocally be given to the subjects of the contracting parties. I have already pointed out the objections to any provision that strangers may exercise special rights in an unusual way. The result of that is that certain persons within a given territory are not subject to general law. Such conventions may even cause a situation like that in the countries which have Capitulations,[16] and that would be a serious matter. On the other hand there is no like objection when an international treaty authorizes the subject of one country to enjoy certain normal rights of the citizens of another country. There one does no more than remove inequality. By doing so analogous concessions can be obtained in the other nation which makes the agreement.[17]

It is easy to see that there is an essential difference between conventions which grant to foreigners the enjoyment of certain usual rights and others which say in what manner rights shall be exercised in cases of private international law. The latter necessarily replace the ordinary rules of law. Thus something which a

[16] In a country of Capitulations each person obeys only the law of his nation. He may even be free from all but the law of his race or that of his religious body.

[17] It is interesting to remember that more than a century ago article 11 of our Civil Code provided for this system of diplomatic reciprocity.

Parliament has voted after debate and after full discussion may be replaced by clauses drafted by diplomatic representatives which no legislature has had a chance to consider, ratify, or reject. Why should one be surprised that conventions of this kind result in the sort of inconvenience which I have indicated? On the other hand, in dealing with a convention which grants to foreigners the usual rights of citizens, those who sign it really act as the agents of their own country to grant rights already available, and it is not likely that any trouble or any interference with the normal working of legal institutions will follow. Another advantage worth remarking is that conventions which grant such usual rights cause very little interference with private persons. Such conventions merely make foreigners better off, and that is the proper rôle of diplomacy which seeks to protect the interests which it represents.

Like reasons make it desirable that more and more conventions should be made upon the question of nationality. Such conventions deal entirely with international points. They cannot interfere with the working of domestic institutions. Indeed, such conventions are properly the business of the state, for it is the state which is particularly interested to know what persons owe allegiance to it. And so I believe that no matter how many of such conventions we have, it will only be in the rarest of cases that we shall have trouble over the question of what nation claims a subject or whether a man is free from any national tie. Now, since the world war has introduced military service almost everywhere, since notwithstanding all dreams about a league of nations for peace there is good reason to believe that some new catastrophe may come to set people against people, and since even the present war is likely to continue in the economic field, we have more reason than ever to take precautions against conflicts in the matter of nationality. The so-called Bancroft treaties of the United States of America and others like them have had most happy results along these lines in the relations of that country with more than one foreign power.

But I submit that each treaty of this class ought to set up an international tribunal, composed of delegates from both countries and with a neutral umpire, which should consider all cases of the application of the treaty. Thus we should avoid conflicts in interpretation such as are only too likely to arise when the courts of

each of the states deal with the same treaty, conflicts which merely create new difficulties in place of old ones.[18]

I am thus led to consider the question whether we should not look forward in a general way to the establishment of international tribunals which should consider every sort of lawsuit depending upon any question of private international law. This is a most seducing notion of long standing. It is pleasant to dream of having questions settled by impartial tribunals presided over by judges skilled in the subject under review. One can think that the decisions of such an authority would be respected everywhere and that they will put an end to the present scandal of conflicting decisions. The thought will be that these become conflicting merely because they are the judgments of courts in different countries. When one meets such decisions one is likely to exclaim with Pascal: "Truth this side of the Pyrenees, error the other."

But I fear that those who support this beautiful dream have not reflected sufficiently upon the obstacles which stand in the way of realizing it. There is one of these obstacles which seems to me practically fatal, for it depends upon the very nature of the institution which is proposed. Such international courts, obviously, could only be set up in small number. Hence their sittings would probably take place far from the domicile of the parties; it would follow that if either party were poor, or if the subject of litigation was not of money importance, the duty to appear before a distant court and the necessity of employing advocates and pleaders who understand that court would be too burdensome. Justice would then be sold at too high a price or denied, and each would be as bad as the other. In France this very inconvenience is bad enough when a case is appealed to the Court of Cassation, and the same is true in like case in other countries. But that sort of thing does not happen very often, and moreover when it does, the case has already been dealt with by an inferior tribunal and very likely an intermediate tribunal. It gets in a sense digested and sufficient light is thrown upon the questions which the supreme tribunal is to

[18] For the differences of interpretation between the German and the American authorities on the subject of the Bancroft treaties, see BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, 240 (1915). For remarks on the conventions about nationality made by France, see my MANUAL, §§ 214–16, 260.

decide. There is little reason to fear that the latter will not comprehend the arguments.

It is quite another thing to set up a court of the first instance for suits depending upon private international law. Such a court would take up a divorce suit brought by a poor workman. A Greek might sue a Russian for a few hundred francs. Someone in Syria might sell merchandise of small value to someone in Norway. No matter how the litigation arose, it is reasonable to suppose that in any one of these cases the person who wanted justice would give it up rather than resort to a distant tribunal. Now there is a grave moral objection when any right is made dependent on difficulties of this kind. The social objection is at least as great. I mean that the masses are likely to be excited against the classes and made particularly bitter if they get the idea that it is not possible for the common people to get justice. And this is especially true when a poor man gets into court against a rich adversary.[19]

Hence I conclude that maritime affairs are about the only class suitable for an international tribunal or jurisdiction. The ordinary maritime suit is generally a matter of some importance, and the parties to it generally have both money resources and a knowledge of how to do their business. There is another reason why if we set up any international tribunal we should confine its activity to this class of cases. Maritime law in all countries has a general resemblance. In no other division of either law or legislation have different nations borrowed so much from each other. Hence the task of an international tribunal would be relatively easy. But if we take up any other kind of business we find for converse reasons very serious obstacles to such tribunals. For instance, what legislation or system of private law is one to apply? That problem is insoluble unless all the nations should join in one common code of private rights, which in turn is not a reasonable notion. Even where they have mixed tribunals, as in Egypt, those tribunals apply only the Egyptian law and have a very limited competence.

And finally if we should wait for such a court before we started to better the situation of private international law we should certainly have to wait until the Greek Calends. Just think of

[19] *Cf.* those statutes of the Roman Emperors which forbade the assignment of causes of action to rich or powerful persons. (*Ne liceat potentioribus patrocinium litigantibus protestare*, CODE JUSTINIAN, Book II, Tit. 14.)

the conferences and the various deliberative assemblies and legislatures which would have to be consulted before any valuable or definite agreement could be reached!

For these reasons it seems to me that the present difficulties of international law are more likely to respond to the private efforts of individuals. Generally speaking, wherever the state has interfered it has been slow and clumsy and unskilled.

When peace is restored and the world begins to live in quiet and without trouble there will be two methods by which men skilled in this sort of thing through their life or profession will be able to do something toward removing the difficulties which stand in the way of juridical acts which are to have a consequence beyond the limits of the territory where they are executed. The first of these will be the development of what is called an arbitration clause. I mean the ordinary stipulation in a contract which provides that differences arising out of it shall not be submitted to a court but to one or more umpires chosen by the contracting parties. Article 1006 of the French Code of Civil Procedure denies validity to these clauses, and the same is true of Italian law. I do not think there is any serious justification for this denial and it ought to disappear from the law in which it is found. If that happens these clauses will come into greater use and very considerable advantage should result. The length and expense of ordinary procedure can be avoided. There will never be any occasion to discuss the jurisdiction, a question upon which so much time is often wasted, before the case reaches any discussion of the merits. And these are the principal causes of the problems which private international law has to solve.

The weak side of this proposal is that it can only be applied to contracts, practically only to commercial contracts. But there are other fields for the same idea. Generally speaking, almost all the juridical acts which a man does of his own free will can be helped by another procedure. It is possible to diminish the frequency of conflicts of laws upon such matters by a plan which is not new but which has so far been seldom employed. This is merely that one should state in each juridical act, whether it be a contract, a will, or a marriage, that it is to be governed by the legislation of a specific country. One can easily know in advance when such an act is one likely to be called in question in a foreign country or deals with the rights of persons of different nationalities. And if in such

cases this precaution should be taken it certainly would avoid a great number of lawsuits; I mean the suits which turn upon the law of the personality of the individuals interested in the act. Or it may be the law of the place where the contract has been made or that of the place of performance. No one will contest the substantial advantage which would follow from an extensive application of what I may call the principle of the autonomy of the free will. And what do we need before we can accomplish this? Nothing, except that the lawyers who draw wills, contracts, gifts, and other like acts should acquire the habit of inserting in their documents this which I call the clause of legislative competence.

In France and I believe in other countries it is common to provide in such an act that any dispute about it shall come before a specified court designated in advance. Now as clauses like this are common and current why should we not give equal currency to those which state with precision and in advance the law applicable to the act itself?

The more people study private international law the more this hope of mine will stand a chance of being realized. One thing is sure: this branch of the law did not receive serious or scientific attention up to about fifty years ago. And in many cases the questions which arise within its field have become complicated, and indeed have arisen at all only because of the ignorance and insufficient skill of the interested parties or their lawyers or the judges who rule their acts. The better private international law is known the more simple it will become. I have just given one proof of this in my proposal about legislative competence, but I believe that what I say about simplicity is broadly and absolutely true.

From this point of view it would seem to me probable that the war may have one happy consequence. More than once in this study I have pointed out the general mixture of men of all nations, the increase of international contracts, and the conflicts of interest which have been caused by this great war. These in turn will cause a great number of controversies over private international law. That division of our science will in consequence attract the attention of lawyers more than ever before, and from this will come progress which may be very fertile.

There is more to this line of thought. Although I have no great confidence in the effect of international conventions, and although

I have felt bound to say much the same thing about the aspirations and drafts of congresses and associations of lawyers, I have for long believed that we have great benefits to expect from the relations among men which are brought about by such congresses, reunions, and meetings to draft treaties. Here we have people distinguished by their education, by their knowledge of the world and their social condition. Many of them have served in legislatures, others are lawyers, professors, and judges. Still others are leading merchants, bankers, or manufacturers. When these people meet and exchange ideas each teaches the others both the institutions and the necessities of his own nation, and the instruction is much more vivid than anything which can be communicated by books or articles in reviews. And when these men go home they cannot help sowing this seed of foreign origin, and if that seed falls upon a fertile soil something grows which means progress.

Moreover, the better one understands any foreign legislation, the greater the possibility that one can borrow some good legal institution from it. Something of this sort may be lacking in a country and it may be plainly worth adopting. This phenomenon is of frequent occurrence. Let me cite the numerous codes which were modeled on the *Code Napoléon* and conversely the different French laws about checks, warrants, and other commercial devices which have been passed in imitation of good English legislation. Everything drives one to believe that the reciprocal penetration of thought will multiply this borrowing and lending between systems of legislation.

There are many distinctions today between the laws of different countries which are bound to grow less for such reasons as these. Before long we may see general principles established and admitted nearly everywhere and resulting in something like the *jus gentium* of other days, that system of rules in force throughout the entire Roman Empire.

Now at the present time many of the problems of private international law arise out of the differences between the legislation of different countries. Suppose that English law should admit of the adoption of children, should permit natural children to be made legitimate and spendthrifts to be put under guardianship. Then certain lawsuits would disappear. I mean lawsuits which now arise both in British courts and Roman law courts out of the

circumstance that the one system possesses and the other does not possess these provisions.

And then just think of the many and most objectionable lawsuits which would be avoided if the validity of marriage was everywhere regulated by the same conditions. Perhaps it would be too much to suggest that divorce should be granted in every country for the same reasons. Litigation on these subjects is not only bad in itself, but bad because of the family and social troubles which follow on it.

Now the influence of the present war upon these subjects may be a happy one. On the one hand it separates, on the other hand it brings nearer together. Think of the different people who have come from the ends of the earth to fight on the soil of my country. Against the common enemy of law, liberty, and beauty we have true crusaders arrayed as truly as in the days of Peter the Hermit, and these men come from every class; merchants, lawyers, manufacturers, magistrates, bankers, and statesmen may all be found. And when they take their intervals of rest, it is likely that each will teach the others. All will see and hear and understand about the customs and morals and institutions and even the legal organization of France and Italy where they do their bit. Now if there is anything in what I have said about the value of the casual relationships between men who go to an international congress of the ordinary sort, if such things as that have had a beneficial influence on international law, am I a dreamer if I believe that much more valuable results will flow from the continued presence of such allies on our territory? There is at least good ground for this hope. We, on our part, are already going to school to our visitors. We ask them questions on all the things that are not answered in books and we grasp with avidity the opportunity to learn, especially because it is presented at the same time that we enjoy the pleasure of being hospitable.

One thing of this sort has already been accomplished: a few months ago the French and the Italian jurists formed an association intended to promote uniformity of civil and commercial law in those countries. And a similar attempt ought to be made in some general way to bring together all the Allies and help them to be allies in the future. May we not even hope to throw a bridge across the gulf between Anglo-Saxon and Roman law?

The best way to build up anything of this kind would be, I think, to start the publication of something in the nature of a review of comparative jurisprudence. There are some reviews, illustrated by the example in France of the *Journal du Droit International* and the *Revue du Droit International Privé*, which sometimes publish decisions of foreign courts, even when those decisions do not deal with international questions. But when they do that they go out of their province, and they do it very little in any case. On the other side the publications of our *Société de Législation Comparée* and of other like societies in other countries do very little to enlighten their readers. They print practically nothing but the text of statutes. They throw no light on how things work. But no one can fairly say that you can get any notion of what the law of a country is by reading texts in books. The result is a little like looking through one of those lenses which slightly distort the objects which at the same time they bring nearer to the eye. If we want to understand foreign law in the sense of having any concrete notions about it, we must do what corresponds to touching the object which cannot be properly seen through a glass. And the only practical way to get in touch with operation of laws is to study the decisions which apply them.

And so I say that a review of comparative jurisprudence is needed and would render great service to the international progress of law. Such a scheme would need a committee of jurists in each nation. They should choose the characteristic decisions of their courts. Then these decisions should be translated into the language used by the review. This sort of translation must be done by people who really understand how to translate legal ideas. And beyond that it would be practically necessary to annotate each one of these decisions, and such annotation requires some skill.

It seems to me that those who are interested in the theory or practice of law, and particularly international law, might well applaud any realization of this plan. It would make it easier to know and understand foreign legislation, and that would contribute to the prevention of conflicts of law. For fairly often such conflicts arise from the application of foreign law in error. A French tribunal may divorce Irish persons who, being Catholics, are bound by the law of indissolubility of marriage. Parties contracting in England may grant a right or easement in some piece of real prop-

erty situated in France, such as is not recognized by French law. Then neither the decree of divorce nor the grant can have any effect in the country where it is intended to operate. This sort of error, however, would probably be patent as soon as any court had passed on it. And the whole thing could have been avoided if there had been greater legal skill on the part of the persons who believed that they knew the Irish law, or how to apply the French law, in the cases cited.

The moving about of individuals which will be caused by military operations is likely to contribute to the exchange of knowledge and the comparison of law. Sometimes it will cause a case of conflict. Sometimes it will make the solution easier. Sometimes it will prevent conflict. But these are not the only results which we may well expect from the new contacts among nations brought about by our fight against German dominion and our league to combat it. There will be at least one other. Today when a question of private international law arises in any country, whether before the legislature or before the courts, very often the elements of the decision are to be found in what I might well call international custom or European common law. I mean the general body of rules, often founded on the Roman law, always based on common sense, justice, and practical necessity, which have been worked out in the course of the past centuries and which have become so familiar that practically no one denies them.[20]

The community of sentiment, of aspiration, and of life, which has been established among the states comprising the Entente, will certainly widen the scope and power of this international custom. *Eadem velle atque nolle, hoc est vera amicitia* is the true and forcible saying of a great Roman historian. Therefore, all the Entente states ought to try to solve their problems of this kind along similar lines, and some community of thought ought to be a necessary consequence of their alliance. We may forecast, from the close relations which have been established among them, not only a tendency of their legislation to borrow freely when good things are found and thus to diminish differences, but also an increasing tendency towards harmony, especially towards harmony in the decision of points of private international law. If this happens, there will follow a system much more satisfactory than any which

[20] See my MANUAL, § 12.

can be established by treaties, for it will be more supple. Then it will adapt itself to situations and to the needs and institutions of the different countries, and so the inconvenience of handling and of interpreting an international treaty is likely to be avoided.

The countryside rarely appears more smiling than after a violent storm. Black clouds cover the heaven and darken the earth; torrents of rain fall and seem to threaten a new deluge; the wind cries, the thunder sounds, and the lightning glares and fills the souls of men with fear. Then comes the sun again, and under his rays the sea, the plains, and the mountains take on a new appearance; the foliage becomes deliciously fresh, the air with marvelous limpidity lets one see far off the very smallest details of the picture laid before our happy eyes. The birds begin to sing again and the farmer turns to his toil. So on the day when our great tragedy, already four years long, in which every citizen of the world has played a part, comes to the end of its final act, humanity will commence a new era. If the battle between the nations is not followed by domestic strife, if we learn from hard experience the lesson which it can teach us, our human atmosphere will have been purified by so much blood and heroism that we ought to be able to see better than ever before the road which we wish to travel to lead civilization to new and important fields of progress.

And I hope that private international law will at least be one of the branches of human activity on which the war will have this beneficent effect. The considerations which I have submitted to my readers seem to me to give fair ground for this prophecy and this hope.[21]

Jules Valery.

UNIVERSITY OF MONTPELLIER.

[21] Translated by Richard W. Hale, Boston.

THE SPANISH CIVIL CODE

POLITICAL, criminal, and adjective laws are important, but the test of a civilization is the Civil Law, that controlling the relations of man and man. It covers his status, whether a man be considered as an individual or as a member of the family, his property, whether in land or in movable things, and the many relations which he sustains to his fellow man by consent in the shape of contract or by wrongful act. It is, so to speak, the core of law, all else being but a protecting shell.

To a lover of Spain the nineteenth century is an absorbing study. The deposition of Charles IV by Napoleon was no great loss, but neither the well-meaning Joseph backed by French influences on the one side, nor the Junta Central and Constitution of 1812 backed by the English on the other side, could prevail. The fall of Napoleon saw the return of Ferdinand VII and reaction. Ferdinand's abrogation of the Salic law in favor of his daughter Isabella II brought on the Carlist civil war upon his death, and even when that was subdued the immoralities of the queen and the political controversies under Espartero, O'Donnell, Narvaez, and others deprived the country of influence, if not of the respect of Europe.

Public affairs were indeed distressing, and yet there was a tendency which promised the regeneration of Spain. Ever since the Constitution of 1812, which for the first time called for a uniform code instead of the multifarious *Recopilacion* and the many local *fueros*, there had been aspirations for codifying the civil side of the Spanish Law. In 1851 the leaders of the *Cortes* prescribed thirty-six fundamentals for such a code, proposed by the same Code Commission which had drawn the successful Criminal Code of 1848. In part they were based on the *Code Napoléon*, and much of their value was due to De la Serna.[1] Although the plan was not carried out, earnest men continued seeking public improvement. Unfortunately the Latin desire for uniformity sought legislation from above rather than civic development from below; but the simplifying of the civil

[1] 1 JURISCONSULTOS ESPAÑOLES, 177, 231; 2 *Ib.*, 144.

laws was a movement which enlisted the support of great men who might differ in political aims. Among them ranks highest Manuel Alonzo Martinez, coming from the old Castilian capital, Burgos, but through his work belonging to all Spain. He was the author of the Law of Waters of 1866, based on the Moorish customs, and, trusted by all parties, was under later administrations the head of the movement. He was president of the General Commission on Codification, and when Minister of Grace and Justice, from the death of Alfonso XII in 1885 until the end of 1888, carried through the work on a civil code. He had had much experience, but his great work was this code.[2]

The two principal difficulties related to marriage and the local *fueros*. The first he overcame by negotiations with Pope Leo XIII, and the second by conciliation, particularly through his book *El Codigo Civil en sus Relaciones con las Legislaciones Forales*, 1884–85. He carried through the Cortes the law of May 11, 1888, for twenty-seven bases, aiming at retaining the old historic principles of the Spanish Law, simplified and harmonized, but taking modern scientific principles into account for the new provisions deemed necessary.[3] There had been propositions by him and Silvela earlier, but the new code followed the bases prescribed in 1888, whether as to authorizing civil marriages, or as to family and property rights, in which modifications entered from the old Foral legislation. The subject of obligations, including contracts, remained largely Roman as before, regard being had, however, to modifications in favor of third persons arising from the Mortgage Law. While the new Civil Code was only supplemental, *supletorio*, in Aragon and other districts having their own *fueros*, it abolished or rather fulfilled the laws and customs of Castile, which substantially made up the code itself. The work as reported was slightly amended by the Codification Commission and became effective July 29, 1889, under Canalejas; but no one questioned that the work as a whole was that of Alonzo Martinez.

In the criticism of the new code much attention was paid to the formal matter of its division into four books instead of three like

[2] Martinez attributed much of the credit for the adoption of the Code by the Cortes to German Gamazo. 1 JURISCONSULTOS ESPAÑOLES, 231.

[3] Base I of the Law of May 11, 1888, in 1 MANRESA COMENTARIOS, 3; 2 JURISCONSULTOS ESPAÑOLES, 224, 269.

the *Code Napoléon*. Of the *Code Napoléon* the first book relates to persons, the second to property and the third to acquisition of property. It seemed to the Spanish codifiers better to have four books, thus dividing the law into Book I on Persons, Book II on Property, Ownership, and its Modifications, Book III on the different ways of acquiring ownership, and Book IV on Obligations and Contracts.[4]

The scientific basis of these distinctions, which go back to the Roman Gaius, is that Law like Nature is made up only of Persons and Things, otherwise called Property. Civil Law therefore is concerned with these in their five combinations. (1) Persons as such, in their relations to each other; a right is the bond, *vinculum juris*, connecting them. (2) When a Person's right directly affects Property it is real, over the Thing, whether movable or immovable, personalty or land, — for the use of "realty" for land is a Common Law term. (3) When the right can be exercised only through another, it relates to Obligations, whether contractual or arising from wrongs or delicts, including negligence. It is here personal, against another person. (4) But persons have rights growing out of the natural relation called the Family, and also (5) out of the artificial relation of Succession, whereby a dead Person now as in Ancient Law is considered as still surviving in the Property he leaves behind him.

Practically these five subjects touch on many facts, but they can at least be treated separately as subjects of study. This the Spanish Code does, but by combining Persons and Family in the first book and Property and Succession in the third.

PERSONS

The old law of Persons was not much changed in the Spanish Code, and indeed, as Bluntschli truly says, law will have little

[4] The Civil Code is published in English as part of WALTON'S CIVIL LAW OF SPAIN AND SPANISH AMERICA (1900); also in 1909 by the House of Representatives of the United States as PUBLIC DOCUMENT No. 1484 of the Sixtieth Congress, second session; and as part of the Compilation of the Revised Statutes and Codes of Porto Rico in 1913 as SENATE DOCUMENT No. 813 of the Sixty-first Congress, third session. The language is not clear in many instances. The *Codigo Civil* was promulgated in Cuba and Porto Rico July 31, 1889, and is still in force in Cuba and in Porto Rico. A convenient late edition with annotations is that of Betancourt, 1916, unlike the Porto Rican revision of 1902, retaining the Spanish numbering.

authority unless it has its roots in the past of its people. New provisions were those allowing civil as well as canonical marriages,[5] divorce, which, however, only suspended life together,[6] and as to the time at which rights should be vested in children.[7] Damages were allowed for breach of promise of marriage, but not its specific performance.[8] The law was made more definite as to what indigent relatives must be supported,[9] and greater attention was paid in the new code than formerly to the subject of natural children, who were now subjected to *patria potestas*, whose extent is defined. Married women were better cared for, although the husband was left administrator of the wife's property. The attention paid to family matters is indicated among other things by the provision that the father must give his daughter at marriage half of what she would inherit from him, which goes back in principle to the Partidas.[10] Now for the first time appears the right of a couple contracting marriage to make property settlements in advance, a provision up to this time peculiar to Aragon, which also gave all the goods left by a deceased spouse to the survivor; and this was but carrying out the principle running all through the Spanish law of keeping the estate of a decedent together as a unit. The code did away with the old curators for minors and instituted protutors, but the most striking change was the establishment of the family council. Precedents had been found for it in the *Fuero Juzgo*[11] and in the *Fuero Real*,[12] but this was as shadowy as the declaration of the Roman Digest [13] directing the praetor to consult with the next of kin of an orphan as to his education and support. Indeed the provision was more European than Spanish, as it is found in France.[14] Nor was it exclusive, for there is also a provision for the interposition of a court on the application of any one in interest.[15]

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[5] Civ. Code, Arts. 75, 83; Porto Rico Civ. Code, § 131.

[6] Civ. Code, Art. 104.

[7] *Ib.*, Art. 29 (P. R. § 24).

[8] *Ib.*, Arts. 43 and 44.

[9] *Ib.*, Arts. 143 and 153 (P. R. §§ 213).

[10] Part IV, Tit. XI, Leyes 8 and 9.

[11] Bk. IV, Tit. III, Ley 3.

[12] Bk. III, Tit. VII, Ley 3.

[13] Lib. XIII, Tit. IV, Lex. 5, § 1.

[14] Coûtume de Paris, Art. 1.

[15] Civ. Code, Art. 219 (P. R. § 255). The Family Council is omitted from the Porto Rican Code.

The twelve titles of Book I after the introductory one cover the subjects of Spaniards and Foreigners, Birth and Extinction of Civil Personality, Domicile, Marriage, Paternity and Filiation, Support of Relations, Parental Authority, Absence, Guardianship, Family Council, Emancipation and Majority, and Registry of Civil Status, which includes marriage, birth and death. This shows how much of Spanish law is taken up with the subject of status, which Mr. Bryce has declared to be the distinguishing feature of the Civil Law in general.

PROPERTY

Book II, on Property and its modifications, has fewer changes, although it is said that Civil Law now centers about Property and not Family as in former times.[16] It contains only eight titles, which relate respectively to Classification of Property, Ownership, Community of Property, Special Properties, Possession, Usufruct, Easements, and the Registry of Property. The basic distinction of movables and immovables remains, and among the changes most to be noticed is the emphasis now laid upon possession as a source of title.[17] The old Spanish law acted upon the maxim *res suo domino clamat*, but this had gradually to give way to other rules in the growth of trade and commerce. The subject of registry, however, is merely introductory; its full development is found in the separate Law of Mortgages. In this connection should be mentioned the institution of *Montes de Piedad*, or state pawnshops, in which one could purchase safely.

Spanish social history even from Roman times had tended to the separation of possession from ownership. The same tendency in England had given rise to the Statute of Uses and to the doctrine of Trusts which gave the Chancellor so much of his jurisdiction. In Spain the title of Usufruct, Use, and Occupancy is a long one, carefully defining the rights and duties of all concerned, enforceable in the same courts as other property rights.

The minute divisions of Spanish law sometimes induce duplication. Thus this division of the Civil Code provides for the law of waters,[18] superficial and subterranean, while the same subject had

[16] SOHM, INSTITUTES OF ROMAN LAW, 163.
[17] CIV. CODE, Art. 464 (P. R. § 466).
[18] *Ib.*, Art. 407–25 (P. R. §§ 414–32).

been quite fully covered by the 1866 Law of Waters for irrigation. So intellectual property [19] was covered also by the copyright law. The most striking instances of this redundance are outside the Civil Code proper in the elaborate regulations really enlarging the Mortgage and Commercial Codes and going far beyond the American idea of explanatory and administrative provisions.

Succession

Book III shows greater changes from the past Spanish law, although it has but the three titles of Retention, Gifts, and Successions, testate and intestate. Thus there is introduced the holographic will, made secretly by the testator, alongside the old testament before a notary, and in this a novelty to Spain, where so much was done by writing before a notary; but there had been already known a nuncupative will proved by the memory of witnesses. Freedom of will was no doubt borrowed from Aragon, Cataluña and Navarre, where there was greater liberty in testaments, although a certain portion of the estate, a *legitima*, could not be willed. In the new code a father could dispose freely of a third of his property, the remainder going to his children in shares which up to a certain point could be varied between them by *mejoras*.[20] The support of the widow was better provided for than previously, for the Partidas only allowed her in case she had no property to take a quarter of what the husband left, and under the new code she takes the share of a child, or a half if there are no descendants or ascendants. Natural children were given greater rights of inheritance; the old Law of Toro (A. D. 1504) [21] had allowed them to be omitted altogether unless there were no other children. The unity of the Succession is maintained, but the heir is not liable for debts unless he has accepted the estate without asking for an inventory.

Obligations

Book IV covers Obligations and Contracts. It is Roman in spirit, but its author, German Gamazo, introduces in Article 1088

[19] *Ib.*, Art. 428.

[20] The third was placed in the Code by the efforts of Castilian representatives over the efforts of Catalonians like Duran y Bass. 2 Jurisconsultos Españoles, 248.

[21] Law 10.

for the first time in any body of law the scientific classification of obligations as consisting in "giving, doing or refraining from doing a certain thing." [22] The titles are Obligations, Contracts, Contracts relating to Property by reason of Marriage, Purchase and Sale, Exchange, Lease, Annuities, Partnership, Agency, Loans, Depositum, Gambling Contracts, Compromises and Arbitrations, Security, Pledge, Mortgage and Antichresis, Obligations without agreement, Concurrence and Preference of Credits, and Prescription.

The elements of a contract are declared to be: 1. The consent of the contracting parties. 2. A definite object which may be the subject of the contract. 3. The cause for the obligation which may be established.[23] Although the Roman law is closely followed, even as to names of different kinds of contract, the famous provision of title 16 of the Ordenamiento of Alcala (A. D. 1348) is preserved in Article 1278, as follows:

> Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist.

This has been declared to be the triumph of the spiritual, Germanic principle of substance over the formality which had become the guiding rule of the Civil Law from the time of Justinian,[24] and which has been the secret of the art of the Latin nations and of the classicism of the Latin mind. The great tendency to form in Spain has been marked even by visitors from other Latin countries.[25] The preference of substance to form is the essence of the English Chancery Court, derived in part from the Canon Law rule *pacta sunt servanda*, but in Spain this is applied through the ordinary courts, as legislation there prevented the rise of separate jurisdictions. The code suppresses the old Roman literal contract as being unsuited to modern conditions and allows greater freedom in re-

[22] 1 JURISCONSULTOS ESPAÑOLES, 231. CIVIL CODE, Art. 1088 (P. R. § 1055).

[23] *Causa* is analogous to the Common Law consideration, but was not reached by evolution of court procedure as consideration was through the widening of assumpsit. [Mouton *v.* Noble, 1 La. Ann. 192 (1846); HOLMES, COMMON LAW, 253, 256.] It is interesting to see how in such ways the common needs of man bring about substantially the same results even in law; and similarly absolution from fulfilling a contract at Common Law by Act of God is in its results much the same as the *Vis Major* of the Civil Law.

[24] 8 MANRESA COMENTARIO, 690.

[25] DE AMICIS, SPAIN AND SPANIARDS, 210; as to Castelar's oratory, 212.

gard to proof of consideration, based upon the provision of *non numerata pecunia*, mistake as to money paid.

The right of rescission, that of canceling a contract if the property is worth only half of the price, is subject to criticism on economic principles, but it still survives except so far as it affects third persons under the Mortgage Law.[26] It rests on the same policy of protecting one from his own improvidence which obtains in the American exemption laws and redemption from judgment sales, neither of which obtain in the Spanish law. The code, however, still allows a co-owner to redeem the share sold by another.

Unless there is a contract before marriage, property is considered as held under the law of conjugal partnership or *gananciales*, which may be modified by judicial decree.[27] Article 1401 of the Civil Code is as follows:

> To the conjugal partnership belong: 1. Property acquired for a valuable consideration during the marriage at the expense of the partnership property, whether the acquisition is made for the partnership or for one of the spouses only. 2. That obtained by the industry, salaries, or work of the spouses or of either of them. 3. The fruits, income, or interest collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either one of the spouses.

Purchase and sale is elaborately provided for, including obligations of both sides, and warranty defined as covering possession and defects.[28]

There could be rescission for loss (*lesion*) of a quarter of the price of property of minors when the tutors sold without the consent of the family council, or court in some cases,[29] and the same principle was applied to agents of persons absent. There were also some changes as to leases, for, contrary to the old rule, the lessee can now sublease without permission of the lessor unless there is an express prohibition in the contract. Curiously enough, however, the rate of interest was not prescribed, and it had to be supplied by judicial construction as six per cent.

The same causes which had separated possession from owner-

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[26] Civ. Code, Art. 1293 (P. R. § 1260).
[27] *Ib.*, Art. 1407 (P. R. § 1322).
[28] *Ib.*, Arts. 1445, 1461, 1474 (P. R. §§ 1348, 1364, 1377).
[29] Longpré *v.* Diaz, 237 U. S. 512 (1915).

ship make annuities, *censos*, important, and with this the subject of *emphyteusis* by which an annual rent in kind is charged upon land. The *censo* is still common. It originated with Roman taxation, but, as Montesquieu shows, became in the Middle Ages the very different thing of a charge or easement by contract between individuals, and particularly in favor of the Church.[30]

Life estates received attention. Philip II prohibited these for more than one life, but this was later extended to two, and the Civil Code removes the limit, leaving it to contract. Partnership is covered, but the form so well known as *sociedad en commendita*, a limited partnership derived from Italy, by which one puts a special amount into the business without further liability, is left to the Code of Commerce. Agency also looms larger, for much business is done by agents, and bailment, *depositum*, pledge, and mortgage, are important from the same tendency to do business through another.[31] Mortgage is discussed but is also the subject of the fuller Mortgage Law, but there remains the anomaly that while land and personalty are both things, *res*, and are considered alike, there can be a mortgage of land but not a chattel mortgage by contract, and the reason is that by Preferences the law has already established all the liens it thinks are proper. The old Roman *antichresis* survives, by which a creditor becomes as it were a mortgagee in possession, applying the produce to interest and principal.[32] Gaming has been a favorite amusement, if not a vice, of the Spaniards perhaps from Gothic times; De Soto's soldiers in the wilds of America gambled away their pearls and even clothing. Charles III found it necessary to declare what was lost at game recoverable by suit, and the new code maintains the same policy, although in different words.

The Civil Law idea of obligation is something that legally binds one person to another, whether by contract, express or implied, or what the Common Law calls tort. The subject of contract is, therefore, largely developed, as in the Roman Law, from which it is mainly taken. Tort is confined principally to sections 1902 and 1903, declaring a person liable for the results of his act, and limit-

[30] CIV. CODE, Arts. 1604, 1628 (P. R. §§ 1507, 1531); CODE JUSTINIAN, IV, 47, Lex 2; ESPRIT DES LOIS, Livre XXX, chaps. 14–15.

[31] CIV. CODE, Arts. 1665, 1709, 1758 (P. R. §§ 1556, 1611, 1660).

[32] *Ib.*, Art. 1881 (P. R. § 1782).

ing his liability for the acts of others to a few specified classes,[33] as follows: —

Art. 1902. A person who by act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

Art. 1903. The obligation imposed by the preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

The father, and on his death or incapacity the mother, is liable for the damages caused by the minors who live with them.

Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or on account of their duties.

The State is liable in this sense when it acts through a special agent, but not when the damage should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding article shall be applicable.

Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.

The liability referred to in this article shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage.

The term "good father of a family" bears the imprint of a jurisprudence which highly regards status.[34] An Employers' Liability Law was enacted in 1901 supplementing the general provisions of the Code as to negligence.

Prescription and Procedure

The Common Law thinks of the Statute of Limitations as a bar to suits, and only as barring the remedy is it a means of vesting rights. The Civil Law is more logical and classes Prescription, — that is time, good faith and paper title, — amongst the modes of acquiring title, although rather illogically both the *Code Napoléon* and the Spanish Code put Prescription in Book Four on Obliga-

[33] Scovile *v.* Soler (P. R. Fed. Court, MS.).

[34] Ortiz *v.* Bull Insular Line (P. R. Fed. Court, MS.).

tions and Contracts. The ordinary prescription of property rights, what is called acquisitive prescription, requires possession in good faith, that is the belief that the grantor owned the property, and under a title apparently valid. Good faith is presumed, but proper title must be proved.[35] Having taken up Acquisitive Prescription, that of rights and property, the code goes on to provide in a separate chapter for Prescription of Actions, barring remedies for the recovery of property and rights, although strictly this would seem to be a matter for a Code of Procedure. The period for a suit as to ownership of personal property, the so-called real action, is three years, but six years if without good faith.[36] As to suit for ownership of lands, also a real action because for the thing, the time is ten years for residents and twenty for non-residents, with a special prescription of thirty years for cases of absent persons holding without title or good faith.[37] Actions prescribe by mere lapse of time, being generally six years as to personalty and thirty as to lands.[38] There are special shorter terms for special cases, such as mortgages, co-owners, rents, fees, wages and innkeepers, one year being the term for possessory actions and torts. Prescription is interrupted not only by suit and acknowledgment, but by demand or extrajudicial claim of the creditor, which opens a wide field for evidence. The prescription for acquiring ownership of property is therefore far different from that of a remedy to enforce rights to property, two things confounded at Common Law.

Procedure in general is covered by the Code of Civil Procedure, earlier in date and still in force, but rights and their enforcement have always been closely identified. The Civil Code declares that a person may have an action on the one side for property or title as such, being what is known as a real action, *reivindicacion*, as under the Roman law, and on the other may sue for its use or possession, this being in the nature of a personal action.[39] So a *redhibitory* action to cancel contracts as to defective animals is also provided

[35] Civ. Code, Arts. 1940, 1950, 1952, 1954 (P. R. §§ 1841, 1851, 1853, 1855). These provisions as to good faith and title are similar to the *Code Napoléon*, Art. 2265.

[36] Art. 1955 (P. R. § 1856).

[37] Arts. 1957, 1959 (P. R. § 1858).

[38] Arts. 1961–63 (P. R. §§ 1862–64).

[39] Civ. Code, Art. 348 (P. R. § 354). As Porto Rico has an American Code of Civil Procedure, that of California, it is an interesting question how far *reivindicacion* and the American remedies coincide. As to land it is practically identical with ejectment.

for.[40] The order of preference of debts becomes important as to this distinction between real and personal actions, as the distinction is in connection with the record or Mortgage Law, which is expressly recognized by the Civil Code as in force.[41] The principles of evidence and proof in general are defined in connection with written contracts, presumptions not being favored and documents being regarded as superior to other evidence.

Other striking instances of remedial matters embraced in the substantive law are the titles of Rescission and Nullity, which are much like those in English Equity and based upon the same principles, although differing in detail.[42] Rescission applies where there is inadequate consideration, *lesion*, and particularly to contracts in fraud of creditors, and necessitates return of the articles with their produce or interest. Nullity applies particularly where the contract is void for lack of the forms of law or lack of capacity of a party, whether or not a crime is involved, and covers both void and voidable contracts. The prescription for Rescission or Nullity suits is four years.

Preferences (Liens)

The subjection of property, particularly land, to debts was a long evolution in England on account of feudal obstacles. Spain had no such trouble, and a debtor's property, present and future, is subject to fulfilment of his obligations.[43] In compensation, liens grew up in Common Law countries, such as those in favor of mechanics making repairs and improvements to articles movable in nature, and these have been extended to realty. The state has also prescribed the order or priority in which the proceeds of the property shall be distributed after the death or bankruptcy of the owner, these being necessary exceptions to the common law freedom of contract. It is characteristic of the wider general control of the government on the Continent that the Civil Law goes further and prescribes the order in which a man shall pay his debts while

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[40] Civ. Code, Art. 1496 (P. R. § 1399).

[41] Civ. Code, Art. 462 (P. R. § 464).

[42] Rescission, Civ. Code, Art. 1290 (P. R. § 1257); Nullity, Civ. Code, Art. 1300 (P. R. § 1267). When either matter comes up in the Federal Court in Porto Rico the procedure is by bill on the Equity side of the docket.

[43] Civ. Code, Art. 1911 (P. R. § 1812).

in the discharge of business;[44] and this is quite apart from merchants: whose matters are controlled by the separate Commercial Code. Such order of payment is called a Preference and is akin to a lien,[45] although it may affect one's whole estate and not as at Common Law and Admiralty be confined to specific articles, and is not enforced by separate proceedings or in special courts.

Preferences on specific personalty in the Code are graded as follows: first, for construction, repair, and purchase price, then successively pledge, warehouse and the like, transportation, hotel lien, agricultural lien for advances, landlord's claim for current year;[46] and the lien follows the goods. As to realty, the priority of preference is taxes, two years' insurance, registered agricultural credits (*refacciones*), registered attachments, and unregistered agricultural credits. There are also preferences on property in general, such as local taxes, judicial expenses, funeral and family expenses, last illness, wages for one year, family supplies, and bankrupt's support. Preferences lowest in the scale are for debts evidenced by an instrument before a notary and then for a judgment after litigation.

In case of conflict among claims of the same class, date controls, except that as to unregistered agricultural advances the last comes first, and advances are preferred to rents.

At the same time with Preferences the Code takes up the subject of Insolvency. Bankruptcy is a separate subject, peculiar to commercial law and will be found in the Code of Commerce, but any one may become unable to pay his debts at least for a time, and the Civil Code therefore prescribes for suspension of payment and compromise;[47] the matter of Preferences comes into special play in this connection. Under the American system as applied in Porto Rico the Spanish law of Preferences is also applied in Receiverships and Bankruptcy.[48]

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[44] Civ. Code, Arts. 1911, 1920 (P. R. §§ 1812, 1822).

[45] *Re* Pilar Hermanos, 8 P. R. Fed. 605, 610 (1916); Yankee Blade, 19 How. (U. S.) 82, 89 (1856).

[46] Civ. Code, Arts. 1922–24 (P. R. §§ 1823–25).

[47] Civ. Code, Art. 1917 (P. R. § 1818).

[48] Welch *v.* San Cristobal, 7 P. R. Fed. Rep. 205 (1914). It is enforced in Porto Rico under the United States bankruptcy law inasmuch as the federal law recognizes local "liens." *Re* Pilar Hermanos, 8 P. R. Fed. 605 (1916).

Fueros

This Code is the consummation of over a thousand years of legal development in Spain. There had coexisted side by side a movement towards general laws, applying first to Castile and then to the whole of Spain, of which Castile was the dominant factor, having for its foundation the old Roman system, originally co-extensive with the peninsula itself, and also for most of this time local systems, contained in municipal or provincial *fueros*, which looked to the preservation of the freer kinds of law which had come down from the Goths and had had their origin, like the English Common Law, in the sands and forests of what is now Denmark and Holland. Each system had its advantages. The one aimed at a general system for the whole country; the other, at local self-government as to civil law. It was found impossible to harmonize them entirely, except in Castile and its provinces. Elsewhere a code could only be supplemental, *supletorio*, as the Spaniards have it, applying to subjects, many in number, it is true, which are not covered by local legislation. The compromise arrived at was expressed in the preliminary sections of the new code as follows:[49]

> The provisions of this title, in so far as they determine the effects of the laws, statutes, and general rules for their application, are binding in all the provinces of the Kingdom.
>
> In all other matters the provinces and territories in which the law of the *fuero* is in force shall preserve it for the present, no change being made in the actual judicial administration, whether written or customary, by the publication of this code, which shall be enforced only as a supplementary law in the absence of that which is such by their special laws.
>
> Notwithstanding the provisions of the foregoing article, this code shall go into effect in Aragon and in the Balearic Islands at the same time as in the provinces not under the foral law in so far as not conflicting with those foral provisions or customary ones which are actually in force.

And thus the Civil Code of 1889 came into being, covering the subjects which must be embraced in every civil code, — Persons, Family, Succession, Property, and Obligations. A large field of

[49] Civ. Code, Arts. 12, 13.

usefulness and growth lies open before it, not only in Spain and its possessions,[50] but as an inspiration and goal for Spanish America, and a model of clear legal statement for the world.[51]

Peter J. Hamilton.

UNITED STATES DISTRICT COURT,
PORTO RICO.

[50] A royal decree of July 31, 1889, made the Civil Code applicable to Cuba, Porto Rico and the Philippine Islands, what were called the provinces of Ultramar. After the American occupation of Porto Rico the code was slightly revised in 1902, — for instance, omitting the provisions as to family council, — and is still in force.

[51] The modern codes had generally appeared before the Spanish Civil Code and so could not formally be influenced by it; but the German Civil Code, adopted 1896 to go into effect 1900, is based upon the same principles of the Roman Civil Law, so far as it was not directly copied from the *Code Napoléon* in force on the Rhine and Frederick II's Landrecht of 1794. The Austrian Civil Code dates from 1811. SOHM'S INST. OF ROMAN LAW, 7.

RIGHTS IN OVERDUE PAPER

[*Dedicated to* EZRA RIPLEY THAYER]

ONE reason for the slow progress of law as compared with medicine or the natural sciences is the impossibility of experimentation. A law professor cannot try out his new descent and distribution statute on the community to see how it works, as a research doctor tries out antitoxins on a guinea pig. The lawyer cannot deliberately isolate legal transactions for investigation, but must take the tangled facts as he finds them. Another scientific method is, however, open to us. Although we cannot artificially produce simplification, we can search for it. After all, law only faces the same difficulties as the other social sciences and even psychology. Like them it can sometimes understand a complex group of factors which constitute a normal situation by finding and observing an abnormal situation from which some of these factors are absent. Mme. Montessori has worked out new theories for the training of a child of average intelligence after studying the slower development of the feeble-minded. Drunkenness removes the inhibitions and preoccupations of daily life, revealing a few primitive emotions in a magnified form. In like manner, the true nature of a legal ight becomes more apparent if we can find it transported to foreign soil in a conflict-of-laws case,[1] and such an everyday phenomenon as the interest of a beneficiary under a trust was thrown into a glaring high light by the peculiar facts of *In re Nisbet and Potts' Contract*,[2] after prolonged examination of the normal situation had not revealed the correct theory of the nature of the interest to so able a thinker as Maitland.

This article is an endeavor to test a theory of negotiable instruments by its application to the abnormal conditions of overdue paper. The investigation will be directed toward one problem, the position of a *bonâ fide* purchaser for value after maturity from a

[1] See for instance the recent cases on the extraterritorial operation of Workmen's Compensation acts; and Alcock *v.* Smith, L. R. (1892) 1 Ch. 238 (C. A.), discussed *infra*, page 1143.

[2] L. R. (1905) 1 Ch. 391; L. R. (1906) 1 Ch. 386 (C. A.), showing that a *cestui que trust* has an equitable right *in rem* against the land and not merely a right *in personam* against the holder of the legal title.

wrongdoer, of an instrument which is payable to bearer or properly indorsed to the purchaser, and free from defenses as regards the original obligor, but subject to claims of ownership of which the purchaser has no notice. In other words, the person from whom he buys has no right to sell and is wrongfully seeking to deprive some one else of the paper or its proceeds when collected. Can the *bonâ fide* purchaser keep and enforce the instrument, or must he surrender it to the victim of the wrong?

I. Theories of Negotiability

Examination of the decisions and text-writers [3] shows not only a wide difference of opinion as to which of these two innocent persons should prevail, but also great uncertainty as to the theoretical nature of an overdue negotiable instrument. Indeed, it is sometimes said not to be a negotiable instrument at all. Thus Langdell, Ames, and some judges have called it an ordinary chose in action,[4] which must mean a non-negotiable chose in action. If this were literally true, consideration would not be presumed and the holder could not sue in his own name. Of course no one supports such a conclusion, and Ames is careful to state that the instruments are still "by an anomaly, assignable." A radically different view is taken by Lord Campbell and Justice Erle in the first English case to consider our problem carefully,[5] and by some American

[3] *References to discussions in textbooks, articles, etc., as to equities of former holders and outsiders in overdue paper:* "Some Problems in Overdue Paper," Francis R. Jones, 11 Harv. L. Rev. 40; Ames, Cases on Bills and Notes, I, 747, 894, notes; II, 853; (but these passages were written about 1881 and do not altogether represent Mr. Ames' later views); Norton on Bills and Notes (4 ed), 271; 1 Daniel on Negotiable Instruments (6 ed.) §§ 724 *ff*, 782; Story on Promissory Notes (6 ed.), §§ 178, 179; Chalmers' Bills of Exchange (7 ed.), 128; Ewart on Estoppel, 423; 46 L. R. A. 753, note; 2 L. R. A. (N. S.) 767, note; 5 A. & E. Ann. Cas. 581, note.

[4] Ames, Cases on Bills and Notes, II, 853. "The career of a bill properly ends with its payment, or dishonor at maturity. If paid, it is *functus officio;* if dishonored, it can no longer adequately perform its function as a representation of money, but is transferred into an ordinary chose in action. But by an anomaly, bills and notes, though overdue, are assignable."

Hinckley *v.* Union Pacific, 129 Mass. 52, 61 (1880), per Lord, J.: "After maturity, a coupon, like any other negotiable security, loses the protection of the law merchant, and becomes a mere chose in action." (This passage embodies Langdell's views. Ames, Lectures on Legal History, 481.) Hinckley *v.* National Bank, 131 Mass. 147 (1881); Henderson *v.* Case, 31 La. Ann. 215, 216 (1879).

[5] Ashurst *v.* Bank, 27 L. T. 168 (1856). Lord Campbell, C. J.: "Though called a negotiable instrument it was in truth a chattel, and only transferable like any other

courts,[6] that an overdue instrument ceases to be negotiable and becomes a chattel, ordinary personal property like a horse. A chattel which gives rise to an action of assumpsit is well worth investigation.

On the other hand, it is repeatedly stated on the highest authority that an overdue instrument is negotiable.[7]

The clash of opinion on this point of negotiability is, however, more apparent than real, and is caused either by the use of analogous instances as if they were identical instances, or else by the employment of the word "negotiable" in two very different senses. Crompton, J., in the early English case just mentioned, points out the need of care in the use of this term.[8] In what sense is an overdue instrument negotiable, and in what sense not? A negotiable instrument not yet due differs from a mere chose in action in several ways, two of which are often called "negotiability." *First*, the transferee is not forced to sue in the name of the original obligee, but sues in his own name. *Secondly*, equities are cut off. (A further distinction, that consideration is presumed, the instrument itself giving a right of action, is also possessed by non-negotiable bills and notes and hence is never a source of confusion like the two other characteristics of negotiable instruments.)

Now if by "negotiable" we mean transferable, then it is clear that an overdue instrument is just as negotiable as it ever was. Aside from questions of the effect of wrongdoing, it is treated

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chattel." Erle, J.: "It seems to me extremely important to draw the line clearly between negotiable instruments, properly so called, and ordinary chattels, which are transferable by delivery, though the transferor can only pass such title as he himself had." But see the view of Crompton, J., in note 8.

[6] Wylie *v.* Speyer, 62 How. Pr. (N. Y.) 107, 110 (1881). Van Vorst, J.: "After their maturity, the coupons lost the attribute of negotiability, and they dropped into the category of ordinary property, to which title does not pass by delivery."

Wood *v.* McKean, 64 Iowa, 16 (1884).

[7] Crossley *v.* Ham, 13 East, 498 (1811), Bayley, J., and Ellenborough, C. J.; Graves *v.* Key, 3 B. & Ad. 313, 317 (1832), Tenterden, C. J.; Baxter *v.* Little, 6 Met. (Mass.) 7, 10 (1843), Shaw, C. J.; Fisher *v.* Leland, 4 Cush. (Mass.) 456, 459 (1849), Shaw, C. J. See also the early caution of Buller, J., in Brown *v.* Davies, 3 T. R. 80 (1789).

[8] Crompton, J., in Ashurst *v.* Bank, 27 L. T. 168 (1856): "I do not think it correct to say that after maturity it becomes like a mere chattel, for the negotiability continues in all its strictness. In these cases, two things are to be considered. Generally, a chose in action is not assignable; but, with regard to negotiable instruments, as bills and promissory notes, a different rule obtains, and they are negotiable by delivery. But the question of negotiability is different from the question of title."

exactly the same as before maturity.[9] It is transferred in the same way, by delivery or by indorsement, and by the same form of indorsement, the word "order" not being a necessary part thereof.[10] An indorser after maturity promises to pay on demand, but his liability otherwise is identical. Demand and notice are necessary to charge him.[11] The holder sues in his own name upon the instrument, as was settled by Lord Holt and the merchants at conference on a summer's day of 1699,[12] and the holder can do this even if suit had been started by his predecessor in title.[13] An overdue note is consequently negotiable within the terms of a statute exempting debts secured by "negotiable promissory notes" from garnishment.[14] In short, after maturity as much as before, the paper is intended to circulate and the transferee is himself the promisee of the contract. The promise is not limited to the payee or first holder alone or even to holders before maturity, but runs as a direct promise to every "bearer" of the instrument or to every person duly constituted the "order" of the payee. This direct promise continues up to the very moment that the instrument is discharged.

Therefore, those authorities which declare that overdue paper is not "negotiable" refer only to the second meaning of the word, the complete cutting off of equities by transfer. It is the presence

[9] Capwell *v.* Machon, 21 R. I. 520, 522, 45 Atl. 259 (1900). Stiness, J.: "The fact that a negotiable note is transferred after maturity is not important, except as to equities between prior parties."

[10] Leavitt *v.* Putnam, 3 Comst. (N. Y.) 494 (1850). Hurlbut, J.: "A bill or note does not lose its negotiable character by being dishonored. If originally negotiable, it may still pass from hand to hand *ad infinitum* until paid. . . . Thus, the paper preserves its mercantile existence, and retains the main attributes of a proper bill or note, and circulates as such in the commercial community. . . . Both the note and its indorsement, by a long course of decisions, have been treated as within the law merchant in respect to their main attributes."

[11] Colt *v.* Barnard, 18 Pick. (Mass.) 260 (1836).

[12] Mutford *v.* Walcot, 1 Ld. Raym. 574, 575 (1701): "And Holt, chief justice, said that he remembered a case where an action was brought upon a bill of exchange and the plaintiff declared upon the bill, where it was negotiated after the day of payment; and a question was made, whether the plaintiff could declare upon the bill, or whether he ought to bring *indebitatus assumpsit*. And he said, that he had all the eminent merchants in *London* with him at his chambers at *Sergeants-Inn* in the long vacation about two years ago, and they all held it to be very common, and usual, and a very good practice."

[13] Deuters *v.* Townsend, 5 B. & S. 613 (1864).

[14] Oakdale Mfg. Co. *v.* Clarke, 29 R. I. 192, 69 Atl. 681 (1908). The historical discussion in this case is wrong in saying that equities were not cut off before 1745. See Holdsworth in 31 L. QUART. REV. 173, 184; 32 L. QUART. REV. 20, 26–27.

of this quality which constitutes the difference between current and overdue paper, aside from the necessary postponement of payment because of the dishonor at maturity. So far there is no disagreement.

And now we arrive at our main problem. When we ask, "Is this quality of cutting off equities wholly absent from overdue paper so that all equities run after maturity, or are some equities cut off and not others?" war unceasing rages. Here lies the special task of this article. If overdue paper is wholly non-negotiable in this second sense, then the *bonâ fide* purchaser from a wrongdoer after maturity will never be protected. If, on the other hand, equities are cut off under some circumstances and not under others, it is highly important for business men as well as lawyers to know with accuracy what those circumstances are. And if this accuracy be unattainable in the welter of decisions, at least we can endeavor to learn what the rules as to the position of the *bonâ fide* purchaser ought to be, and to secure those rules by legislation in all the States.

The solution of this problem which is supported by this article as most in accord with the true principles of bills and notes is: *Bonâ fide purchase for value after maturity gives legal title and cuts off equities of ownership but not equities of defense.* In other words, the *bonâ fide* purchaser for value without notice of an overdue instrument payable to bearer, indorsed in blank, or specially indorsed to him, has legal title to the instrument and can keep it, regardless of any wrongs committed upon prior owners or other persons, and can recover upon it against any prior party who has not an equitable defense of his own, but cannot recover against any party who has such a defense.[15]

The theory of negotiable instruments on which this solution rests involves two propositions which it is necessary to discuss at some length. The first relates to the division just mentioned between equities of ownership and equities of defense, the second

[15] This solution is by no means original with the writer. It was reached by Mr. Ames subsequently to the publication of his "Cases on Bills and Notes," which of course present a different view, and it has been accepted by other teachers of law. Ewart takes the same position in his ESTOPPEL, pages 423–24. The best judicial expression is in the recent case of Wolf *v.* American, 214 Fed. 761 (C. C. A. 7th 1914). A slightly different view is presented by Francis R. Jones, "Some Problems in Overdue Paper," 11 HARV. L. REV. 40.

to the passage of legal title to a possessor within the description of the instrument whether overdue or not.

1. *There are two distinct classes of equities affecting a negotiable instrument, equitable claims to ownership and equitable defenses to liability on the contracts*

The second kind of "negotiability," the cutting off of equities, is such a common phenomenon and we are so used to seeing the holder in due course start with a clean slate, that we frequently fail to observe that two entirely different sorts of equities existed before the transfer. Both white and red chalk marks have been sponged from the slate. This distinction between "equities" as to liability and "equities" as to ownership is fundamental, and is one more instance of the dangers lurking in that ambiguous word.

These two kinds of equities correspond to the duplex nature of the negotiable instrument itself. We have seen how some persons call an overdue instrument a chose in action and others call it a chattel. In truth, a bill or note, whether overdue or not, is both a chattel and a chose in action — or more frequently several choses in action. It is a chattel, a tangible scrap of paper, sometimes valuable for its own sake if sufficiently ancient or bearing the autograph of some historic debtor like Dick Steele or William Pitt or Daniel Webster, always available for framing or even papering the wall, for which purpose unlucky investors have used their coupon bonds. As a chattel, it is the subject of conversion which gives rise to trover, has been held to be covered by the designation "goods and chattels" in the Statute of Frauds, and is taxable where situated, though the owner and the obligor reside elsewhere.[16]

Secondly, a bill or note is a bundle of contracts. Its ownership involves not only the right to possess a thing but the right to sue several persons — maker, drawer and acceptor, indorsers. The promises and the chattel are inseparable. The right to hold the paper and the right to enforce the obligation are in the same person.[17] If an illustration from ichthyology be permissible, the duplex

[16] AMES, CASES ON BILLS AND NOTES, II, 799, 800; Wheeler *v.* New York, 233 U. S. 434 (1914).

[17] Perreira *v.* Jopp, cited in 10 B. & C. 452 (1830) note; II AMES, CASES ON BILLS AND NOTES, II, 51 note. Lord Kenyon reports an amusing colloquy between Lord Mansfield and counsel as to the supposititious case of a promissory note engraved on a diamond ring, which would test Mansfield's statement, "he could never bring himself

nature of a negotiable instrument, this piece of property from which depend numerous obligations running in different directions, always reminds me of a jelly-fish with its streamers.

Now, equities must be classified accordingly as they relate to the ownership of the chattel or to liability on some obligation. If the bearer of a note payable to bearer is induced by fraud to deliver it, he has an equitable right to restitution of his property. He is in no danger of liability upon the instrument, but he wants it back so that he may collect it at maturity. He asserts his equitable claim to ownership in an action of trover [18] just like a person from whom a horse has been bought by fraud.[19] The legal proceeding is only a substitute for a bill in equity for restitution,[20] such as the Duke of Somerset brought for "the old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules." [21] A person who never had title to a bill or became a party to it may have an equitable claim to its ownership because it is held in trust for him [22] or because it was wrongfully bought with his money [23] or because his debtor made a conveyance of the instrument in fraud of creditors.[24] The equity in these cases has nothing to do with liability, for there is no liability. The remedy is affirmative and not defensive.

Equities as to liability are entirely different in their nature. If the maker of a note is induced to sign it by fraud, he has an equitable defense at law when he is sued on the contract. In this case the parallel in chancery for his relief is a permanent injunction against the action at law on the obligation.[25] If this were a specialty

to think for a moment that a man who had no title to the value of a bill or note, could recover in an action of trover for the paper merely, which was of no value whatever."

[18] AMES, CASES ON BILLS AND NOTES, II, 693. The measure of damages is the amount recoverable, *prima facie* the face value.

[19] WILLISTON ON SALES, § 567.

[20] "Purchase for Value without Notice," J. B. Ames, 1 HARV. L. REV. 1, 4, note. (LECTURES ON LEGAL HISTORY, 256, note): "In truth the fraudulent vendee who gets the title is a constructive trustee, and the action of trover against him presents the anomaly of a bill in equity in a court of common law."

[21] Duke of Somerset *v.* Cookson, 3 P. Wms. 389 (1735).

[22] Turner *v.* Hoyle, 95 Mo. 337, 8 S. W. 157 (1888).

[23] *In re* European Bank, L. R. 5 Ch. App. 358 (1870).

[24] Sanderson *v.* Crane, 2 Green (14 N. J. L.) 506 (1834).

[25] Mines Royal Societies *v.* Magnay, 10 Exch. 489, 493 (1854); Steele *v.* Haddock, 10 Exch. 643 (1855); Wood *v.* Copper Miners, 17 C. B. 561, 591 (1856). MASS. STAT. 1883, c. 223, § 14, permits a defendant to allege, as a defense in an action at law, "any

instead of a negotiable instrument, the defrauded obligor would before modern statutes have had to go into chancery to maintain his defense,[26] and the equitable defense on a negotiable instrument is precisely the same kind of relief in a law court, which in effect enjoins suit on the instrument. Instead of waiting until he is sued on the bill or note and setting up his equitable defense at law, the obligor may use it as the basis of a bill in equity to enjoin negotiation and have the paper surrendered for cancellation, so that it may not get into the hands of a holder in due course and the defense be lost. Such a proceeding, though affirmative in form, is defensive in substance and wholly unlike the proceeding in chancery for restitution on the basis of an equitable claim to ownership. The maker of a note asserts an equitable defense, not an equity of ownership. He has no right to get the note back and sue on it. The holder may be forced to surrender the note but it does not go back to the maker. It is canceled and kept by the clerk of the court. A bill for cancellation is so completely unlike a bill for restitution that it does not even necessitate a technical right to the paper upon which the instrument is written. Cancellation will be given even though the obligor's signature was fraudulently obtained upon paper belonging to the obligee, or was forged, so that the obligor never had anything to do with the paper at all.[27]

In short, the two classes of equities are entirely distinct. The equities as to ownership are property rights in a chattel with its dependent obligations, on which the claimant wants to sue as plaintiff. The equities as to liability are at the opposite end of those obligations. Instead of being property rights (the basis of *vindicationes* in Roman law), they are set up by a defendant as defenses (*excepliones*) to litigation on a contract. Equitable claims to ownership are no more like equitable defenses than a declaration in trover is like a plea of payment. They have been confused because they have both been called "equities" and because the

facts that would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action."

[26] "Specialty Contracts and Equitable Defenses," J. B. Ames, 9 HARV. L. REV. 49; AMES, LECTURES ON LEGAL HISTORY, 104.

[27] Davis *v.* Manson, 102 Atl. (R. I.) 714 (1918). Cases in which the cancellation of overdue paper is ordered clearly proceed on defensive grounds. Fuller *v.* Percival, 126 Mass. 381 (1879); Atlantic *v.* Tredick, 5 R. I. 171 (1858).

same person is frequently entitled to set up both an equitable claim to the restitution of the instrument and an equitable defense if he is sued upon it. In the illustrations just given only one kind of equity was present, but take the case of an indorser who transfers a note without consideration to an attorney for purposes of collection and the attorney keeps the note and sues the indorser on his indorsement. The indorser will have an equitable defense of lack of value, and also an equitable claim to get the note back. Another reason for the failure to separate the two classes of equities is that there is no practical need to do so in the ordinary case of current paper, since transfer of the legal title before maturity to a *bonâ fide* purchaser for value without notice cuts off both equities of ownership and equitable defenses without distinction.

This brings us to our second proposition. How does the legal title get into a *bonâ fide* purchaser?

2. *The legal title to a negotiable instrument throughout its existence belongs to the person to whom the promises run by the terms of the instrument if he has possession, no matter how that possession came to him.*

This proposition is extremely important for our problem because if it be sound, the fact that a *bonâ fide* purchaser after maturity takes from a wrongdoer, even a defrauder or a thief, will be immaterial to deprive him of protection. He has legal title, and where equities are equal the legal title prevails. On the other hand, if possession by one within the description of the instrument does not always involve legal title, it will be necessary to determine the conditions under which possession does or does not confer legal title upon the *bonâ fide* purchaser after maturity.

The validity of our second main proposition seems plain from the language of negotiable instruments, but it invariably causes uneasiness; because if it be true, a thief has legal title. This is the acid test to which we shall not delay to submit our theory.

A thief has legal title to a negotiable instrument payable to bearer or indorsed in blank. It is high time to stop being squeamish about this. Other bad men are admitted to have legal title to negotiable instruments, and sometimes to chattels as well, — defrauders, absconding trustees, impersonators. Of course the thief

is, like them, subject to the equities of his victim, but like them he does have legal title.

It is usually assumed that the victim retains legal title after the theft. This cannot be, for the instrument is by its terms payable to bearer and no one who is not a bearer can sue upon it in a court of law. If the thief is bearer but has not legal title, then the legal title has temporarily ceased to exist, for there is no one else to whom the promise runs. Lord Holt put the matter clearly in 1699: "The course of trade . . . creates a property in the assignee or bearer." [28] The *bonâ fide* purchaser from the thief gets the legal title because it was first in the victim and then in the thief and then in the purchaser, passing with the possession. The title did not jump over the thief or pass through some mysterious legal subway. The effect of the *bonâ fide* purchase is not to create a fresh legal title but to cut off the equities of the victim.

The promisee owns the promise and with it the instrument. If the promise runs to bearer, any bearer, however iniquitous, is the promisee, with the legal right to sue and the legal ownership of the paper. If the promise runs to the order of the payee and it appears within the four corners of the instrument that the payee directed payment to a certain indorsee who holds the paper, that person is the promisee, the legal owner, no matter how he obtained the possession.

This result follows after maturity as much as before, since the instrument is just as transferable. The direct promise to the holder remains. The only effect of maturity is, as we have seen, upon the cutting off of equities.

Consequently, payment to the person described by the instrument and producing it to the payor is a valid payment, and the payor is not affected by the wrongful acquisition unless he has notice thereof. The instrument is discharged whether this payment is made at or after maturity.[29] Here is a strong proof that the

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[28] Anonymous, 1 Salk. 126 (1699).

[29] *Payment to one within the description though wrongful owner is a valid discharge. At maturity:*

Anonymous, Style 366 (1652), time not stated;

Vinson *v.* Vives, 24 La. Ann. 336 (1872), payment to payee, who was subject to equity, time not stated.

Chappelear *v.* Martin, 45 Oh. St. 126, 132, 12 N. E. 448 (1887), *semble.*

Minshall, J.: "Such is the general rule as to the payment of a note payable

wrongful holder has legal title, since payment to a person without legal title, *e. g.* a holder under a forged indorsement, is not a discharge.[80]

Possession plus description equals legal title.

This view runs back to the early cases on negotiable instruments. Lord Holt has already been quoted, and Chief Justice Eyre stated it more fully:

"For the purpose of rendering bills of exchange negotiable the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves.

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to bearer; any person having it in possession may be presumed to be entitled to receive payment, unless the payor has notice to the contrary."

Proctor *v.* M'Call, 2 Bailey (S. C.) 298 (1831), *semble.*

Greve *v.* Schweitzer, 36 Wis. 554 (1875), time not stated, bearer note.

After maturity:

Cone *v.* Brown, 15 Rich. (S. C.) 262 (1868), bearer note, paid to agent for safekeeping.

King *v.* Fleece, 7 Heisk. (Tenn.) 273 (1872), *semble,* order note indorsed in blank, payment in Confederate money to agent for collection after death of principal is good because bearer had legal title; but bad here because payor knew of the agency.

Lamb *v.* Matthews, 41 Vt. 42 (1868), bearer note, paid to holder who had duty to return it to her transferor.

Some of these cases say that the person paid had "authority" to receive the money, but it is clear that no true authority existed.

Contra as to payment after maturity:

Hinckley *v.* Union Pacific, 129 Mass. 52 (1880).

Bainbridge *v.* Louisville, 83 Ky. 285 (1885).

AMES, CASES ON BILLS AND NOTES, II, 822, 854; but Ames is known to have altered his opinion.

These cases, however, rest on another ground as well, that information had been given to the payor of the theft of the instrument. Although the purchaser of an instrument is not affected with notice of a theft because he had previously received information about it, Raphael *v.* Bank of England, 17 C. B. 161 (1855); Lord *v.* Wilkinson, 56 Barb. (N. Y.) 593 (1870); a payor is affected because he may reasonably be required to keep a record of his own outstanding obligations. The cases should properly rest on this ground alone.

The Negotiable Instruments Law prevents any further controversy as to the effect of payment after maturity, for section 119 (1) says, "A negotiable instrument is discharged by payment in due course by or on behalf of the principa debtor;" and section 88, "Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and with out notice that his title is defective." See also section 51.

[80] Smith *v.* Sheppard, CHITTY, BILLS (10 ed.) 180, note; S. C. 1 AMES, CASES ON BILLS AND NOTES, 804.

The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods of which the property and possession may be in different persons. The property passing with the possession." [31]

The United States Supreme Court has also stated: "The title and possession are considered as one and inseparable." [32]

Various attacks have been launched against this legal title theory. Thus Ewart says, "Property and possession of bills, as of aught else, are separable; otherwise I could never bring trover for bills against my book-keeper." [33] The reply has been explained already.[34] The plaintiff in trover does not have legal title but recovers on the equitable right to restitution, just like the defrauded seller of goods, whose interest must be only equitable since it can be cut off if the fraudulent buyer sells to a *bonâ fide* purchaser for value without notice.

Another objection is that if the thief had legal title he could sue on the instrument. Two answers are possible. The thief is subject to the true owner's equity of ownership, and in jurisdictions which allow the maker, acceptor, etc., to set up the equity of a defrauded owner, that of a robbed owner could be set up just as well.[35] Some jurisdictions, however, take the sounder view that the *jus tertii*, the right of a person who is not a party to the suit, cannot be set up as a personal defense.[36] Even so, the thief would have no standing in court, on grounds of illegality and public policy, for no court would lend its aid to carry through a crime and enable him to cash in his plunder. Once the thief gets into the purview of justice, the criminal law cuts across the law of property and nullifies the advantages of his legal title, just as it disregards the legal title of the counterfeiter to his plates and acids and hands them over to the police.

A final difficulty in the legal title theory is its inconsistency with

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[31] Collins *v.* Martin, 1 B. & P. 648 (1797).

[32] Clifford, J., in Goodman *v.* Simonds, 20 How. (U. S.) 343, 365 (1857).

[33] EWART ON ESTOPPEL, 394, note.

[34] See discussion on page 1110, and notes 19 and 20.

[35] Eyre, C. J. in Collins *v.* Martin, 1 B. & P. 648 (1797): "This all proceeds upon an *argumentum ad hominem*. It is saying you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience." And see the language of Shaw, C. J., in Wheeler *v.* Guild, 20 Pick. (Mass.) 545 (1838).

[36] See page 1141, *infra*, and notes 122, 123 and 124.

the oft-stated doctrine that delivery is necessary to pass title to a negotiable instrument. Since there is no delivery to a thief, legal title must logically remain in the victim instead of passing to the thief. But if this is so, how does it ever get to the *bonâ fide* purchaser from the thief? If delivery is essential to the passage of legal title as a genuine indorsement is essential, then want of delivery would be as fatal as a forged signature. In fact, want of delivery like fraud or any other equity is cut off by transfer to a holder in due course. A plaintiff suing on an instrument need only prove his possession and the genuineness of the indorsements, but not delivery by the indorsers. Legal title to a properly issued negotiable instrument depends upon facts which can be ascertained by inspection of the instrument and identification of the parties, *i. e.*, who possesses it, what is written upon it, who signed it. Extrinsic facts, which cannot be so ascertained, are equities and do not affect holders in due course.[37] A thief has legal title subject to the equity of want of delivery as a defrauder has legal title subject to the equity of fraud. Legal title passes, not by delivery, but by transfer of possession within the terms of the instrument.

It must be admitted that many authorities instead of recognizing this legal title theory, take an alternative view, that the *bonâ fide* purchaser before maturity from a wrongdoer has legal title because the wrongdoer had authority to give it.[38] This implied authority is obviously a fiction just like implied promises in quasi-contract. To say that the Northampton Bank gave any authority to the masked burglars who removed the bonds from its safe on the night of January 18, 1876 to sell those bonds, is as absurd as to declare that the owners of the derelict steamer *Grotkau* in Kipling's "Bread upon the Waters" promised to pay salvage to McPhee, the Scotch engineer who swam over and took her in tow. This assumed agency is only an instance of the judicial tendency to explain results created by law as if they were due to the will of the parties. Instead of looking to the scope of the authority to define the protection afforded the *bonâ fide* purchaser, as we should do in genuine

[37] Want of delivery at the inception of the instrument is a defense in some jurisdictions at common law but not under section 16 of the Negotiable Instruments Law. L. R. A., 1915, E., 351, note.

[38] Marston *v.* Allen, 8 M. & W. 494 (1841).

cases of agency, the courts must necessarily first decide the extent of the protection and then invent an "authority" of equal extent to account for it. And furthermore this artificial authority attributed to the wrongdoer is so much like a legal title subject to equities, that the refusal of the courts to admit such a title recalls the statement in the school-boy's composition, "The Iliad was not written by Homer, but by another man of the same name."

A much sounder theory adopts an agnostic position, rejects this unknowable authority given by nobody, and says that the *bonâ fide* purchaser of a negotiable instrument before maturity is protected because the law thinks him worth protecting, like a purchaser in market overt or under the Factor's Acts. The law of its own volition takes the title out of the victim and puts it into the buyer by an intermediate process which baffles explanation. The wrongdoer is said to have a power to pass title, yet this power is admittedly not given by the victim, but created by law to attain justice. This agnosticism, while honest, overlooks the express promise on the instrument running o the wrongdoer by virtue of his possession, and furnishes no aid in the different situation of purchase after maturity except that it is a strong analogy favoring the protection of *bonâ fide* purchasers in general. That is to say, the extent of the "power" depends on the justice of the particular case, and when new circumstances are considered, a new "power" must be affirmed or denied to reach a just result in the new situation. The "power" is co-extensive with the protection which the law thinks should be afforded to a *bonâ fide* purchaser.

Apart from this empirical quality of the power theory, it is possible that it is not essentially at variance with the legal title theory. With the disappearance of the division between law and equity, it is probable that the terminology of legal and equitable titles will gradually disappear, and that in the scientific property law of the future, the present equitable title will be regarded as the true ownership of the thing, while the present legal title will be regarded as a power created by law to deal with the thing and not a property right at all.[39] In short, all legal titles are only

[39] Hodges, J., in Arnold *v.* Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 198, 123 S. W. 1162, 1168 (1909): "Under our system the *cestui que trust* is the real owner of the property, and the trustee merely the depository of the legal title. His is

powers. Whether the wrongdoer's dominion over a negotiable instrument be called legal title or power is perhaps only a matter of terminology. The vital point upon which I insist is that the limits of his dominion are not determined solely by the *ipse dixit* of the law, but by the terms of the instrument. By virtue of those terms this dominion over the instrument, call it what you will, passes with the possession of the instrument to any person within its description, after maturity as well as before, regardless of the manner in which that person obtained his possession. The terms of the instrument prevent an arbitrary termination of the "power" at maturity.

In other words, so long as the advocates of the "power" theory recognize that the holder of an overdue negotiable instrument has the same power that a trustee has of cutting off equitable ownership of the *res*, I need not stop to quarrel with them; but it seems to me more logical and less confusing, so long as the present dual terminology continues in use, to say that both the trustee and the holder to whom the promise runs have a legal title. It is hard to see why if the law can give the thief a power without the consent of his victim, it cannot also give him legal title without consent.

One more theory is presented by Mr. Ewart,[40] who anticipates the main conclusions o this article very closely. I find myself in frequent agreement with him as to details, but not convinced of his fundamental belief that the protection of the holder in due course is based on estoppel.[41] According to his theory, the wrong-

not a property right, but a legal duty founded upon a personal confidence; his estate is not that which can be enjoyed, but a power that may be exercised."

C. A. HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY, *passim*, especially page 148: "Had the courts of common law been less entangled in the nets of form — to use the damning phrase of Mansfield — the legal estate of the trustee with its possibilities of injustice might have been reduced to a mere power in law as well as in equity, and the trustee treated there, as on the other side of the court, as the agent which in reality he is."

[40] EWART ON ESTOPPEL, chap. XXIV.

[41] See a review of Mr. Ewart's book in 13 GREEN BAG, 50.

The broadness of his principle of estoppel is a reason for doubt as to its validity. If the liability of a man who issues a note payable to bearer for $1,000 and of him who issues one for $5, so carelessly written that it is raised to $1,000, are both based on estoppel, we do not get anywhere because we have got to work out two different types of estoppel to explain the results. So with those philosophers who make selfishness the basis of all conduct. The generous man is the most selfish because he gets a higher satisfaction from his self-denial than the man who keeps everything for

doer has not legal title; but his possession is an apparent title, so that the true owner though retaining title is estopped to set it up against a purchaser who relies on the ostensible ownership. Since the wrongdoer's "apparent" title, like his "authority," has all the qualities of a genuine legal title subject to equities, we may conclude with Bishop Berkeley that the appearance is the reality.

With respect to *bonâ fide* purchase before maturity, it is entirely immaterial to the substantial rights of the parties which of these various theories is held. There will be differences as to pleading and burden of proof, but the holder in due course will always be protected from equities of both kinds on any theory. It is the abnormal situation, dishonor, which forces us to choose between the various views, and in particular reveals the serious difficulties of the orthodox authority doctrine.

The previous discussion may be summed up as follows. Transfer to a *bonâ fide* purchaser for value without notice and within the terms of the instrument has three results before maturity:

1. It passes legal title with the possession.
2. It cuts off equitable claims to the ownership of the paper.
3. It cuts off equitable defenses to the liability of parties on their contracts.

The first result follows equally by a similar transfer after maturity. Our remaining task is to explain why the second result should also continue, while the third is no longer effected.

II. The Distinction Between the Two Classes of Equities After Maturity

Apart from questions of notice the *bonâ fide* purchaser after maturity of a negotiable instrument, since he has legal title, should be protected from equitable claims to ownership just like the *bonâ*

himself. So be it — but if the man who waits on a sinking steamer until all the women and children are put off is as selfish as the man who jumps into the first life boat and stays by main force, we have solved nothing, for we must find some way to create more of the first kind of selfishness and less of the second.

No doubt a policy similar to that on which estoppel by reliance on special situations rests underlies the law as to the general operation of negotiable instruments, that is, the policy in favor of the security of *bonâ fide* transactions. But it is better to limit the term estoppel to abnormal situations where the truth cannot be set up because of misconduct.

fide purchaser for value of any other chattel, who of course takes free from the equities of a *cestui que trust*, defrauded seller, etc. Even if an overdue instrument be regarded as a non-negotiable chose in action, instead of a chattel, the same result will follow. Several courts[42] protect the *bonâ fide* purchaser after maturity on the basis of Chancellor Kent's doctrine in *Murray* v. *Lylburn*,[43] that the assignee of a chose in action takes subject to the equities of the obligor but not to "latent" equities. The same view was held by Ames, that the assignee having a legal power should be protected in his ownership of a chose in action.[44] If this protection is given to the assignee of a chose in action, it should certainly be given to the holder of an overdue negotiable instrument (always on the assumption that maturity is not notice of these "latent" equities). It is true that *Murray* v. *Lylburn* is rejected in many jurisdictions, including New York;[45] and the case has been criticised on the grounds that the assignee of a chose in action has only an equitable interest and that the *bonâ fide* purchaser of an equitable interest is not entitled to protection against prior equities.[46] We need not launch out upon that stormy sea. The objections to Kent's doctrine do not apply to the holder of an overdue instrument, because he has legal title and consequently is within the scope of the principle that where equities are equal the legal title prevails. Consequently Mr. Williston, in arguing that the assignee of an ordinary chose in action has only an equitable interest, believes that the holder of an overdue instrument should take free from equitable claims to ownership.[47]

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[42] National Bank *v.* Texas, 20 Wall. (U. S.) 72, 88, (1873) per Swayne, J.; Mohr *v.* Byrne, 135 Cal. 87, 67 Pac. 11 (1901); Crosby *v.* Tanner, 40 Iowa, 136 (1874); Hibernian *v.* Everman, 52 Miss. 500 (1876).

[43] 2 Johns. Ch. (N. Y.) 441 (1817).

[44] "Purchase for Value without Notice," 1 HARV. L. REV. 1; LECTURES ON LEGAL HISTORY, 254; CASES ON TRUSTS, 309, 310, the notes to Cave *v.* Mackenzie, 46 L. J. (Ch.) 564 (1877).

[45] 30 HARV. L. REV., 103, note 10; Williston's Wald's Pollock on Contracts, 284, n. 78.

[46] "Is the Right of an Assignee of a Chose in Action Legal or Equitable?" Samuel Williston, 30 HARV. L. REV. 97, 102. For other articles by Mr. Williston and Mr. Walter Wheeler Cook on this question see 29 HARV. L. REV. 816; 30 HARV. L. REV. 449; 31 HARV. L. REV. 822.

[47] 30 HARV. L. REV. 103: "A distinction must be taken where the chose in action has a tangible form, especially if it is by law assignable. The assignment of an overdue negotiable promissory note though often likened to that of an ordinary chose in action

A pertinent question here presents itself. Are equities really equal? It is clear that they are not if the purchaser takes with notice of the equitable claims to ownership. It will be urged that maturity is equivalent to such a notice, that after that critical day an overdue instrument has no right to be in circulation at all. The fact that it is overdue is like a red flag which gives warning of every conceivable kind of danger and puts the purchaser on inquiry as to all infirmities without distinction. This is clearly going too far. It is well settled that certain defenses on the instrument are not let in after maturity. For example, in England and a large number of States a set-off does not run against the purchaser. In many jurisdictions the defense of accommodation is cut off by a transfer after maturity. Evidently maturity does not force the purchaser to proceed at his peril and make him voluntarily assume all risks. A particularly interesting example of the principle that a purchaser after maturity does not thereby become a purchaser with notice of all unknown defects is furnished by the case of *Re Clover*.[48] A New York statute provided for proceedings against a judgment debtor supplementary to execution, and the appointment of a receiver who was given title to all personal property in the hands of the debtor at the time when he was ordered to attend for examination concerning his property. But the statute did not affect the "title of a purchaser in good faith, without notice, for a valuable consideration." After the service of the order upon the judgment debtor, he transferred overdue negotiable notes to a purchaser for value without actual notice. The receiver contended that the immunity clause would not enable the purchaser to keep the notes, because maturity prevented him from being "without notice" and the fact that the paper was overdue put him upon inquiry as to what, if any, defenses, liens or equities existed. According to him, the purchaser of an overdue instrument is in a worse position

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does not properly involve such a discussion as is contained in this article. Even after maturity the transfer of such a note by the holder unquestionably transfers a legal title and though the circumstance that the transfer is after maturity puts the taker of the note on inquiry as to any defense the maker may have (since if he had had no defense the instrument would presumably have been paid) yet the fact that the instrument is overdue gives no reason to suppose that there are collateral equities affecting the transferor's title. In such a case, therefore, the *bonâ fide* purchaser of the note is protected."

[48] 8 App. Div. (N. Y.) 556; 154 N. Y. 443 (1897).

than the assignee of an ordinary chose in action which has no maturity to put the purchaser on inquiry. Both the Appellate Division and the Court of Appeals rejected this distinction and decided against the receiver, holding that maturity did not *ipso facto* create notice or bad faith, but was at most only evidence bearing upon the question of good faith, so that this purchaser was without notice and took the notes free from the creditor's lien. Martin, J., said:

"It is true that all of the notes purchased, except one, were past due, yet that fact was in no way inconsistent with a good title in the holder or with his right to transfer them. . . . The fact that most of the notes had previously matured would not naturally have indicated that the holder was not the owner, nor would it have suggested that any proceeding was pending against him which would affect his title." [49]

The same reasoning applies to all equities of ownership. Maturity indicates nothing about them. Instead of being a red flag to give warning of all hidden dangers, it resembles more closely a printed placard calling attention to one special peril. A person approaching a grade-crossing and seeing the sign, "Stop, Look, and Listen," is bound to watch for trains, but he does not assume the risk of a savage bull-dog maintained on the railroad right of way to scare off track-walkers.

At this point it is necessary to keep the distinction between the two classes of "equities" firmly in mind. Equitable defenses are let in after maturity for a good reason, but that reason does not apply to equitable claims to ownership.

The rule that a purchaser of overdue paper takes subject to equitable defenses was established in England comparatively late,[50] largely by the influence of Justice Buller, and was accepted with reluctance in 1789 by the Court of King's Bench.[51] Even then, Chief Justice Kenyon doubted its validity, and concurred with the other judges only because he thought that there was actual notice. There is much vague explaining in these early cases, that transfer after maturity gives rise to suspicion and is out of the common

[49] 154 N. Y. 443, 448 (1897).

[50] In Banks *v.* Colwell (1788), cited in 3 T. R. 81, Justice Buller said that it had been repeatedly ruled at Guildhall that the indorsee after maturity was subject to equitable defenses. And see 3 T. R. 83, (1789) note. Brown *v.* Davies seems to have been the first case decided *en banc*.

[51] Brown *v.* Davies, 3 T. R. 80 (1789). For Kenyon, see also Boehm *v.* Sterling, 7 T. R. 423, 429 (1797). And see the discussion of the Civil Law in note 131, *infra*.

course of dealing. Overdue paper is often said not to be commercial paper at all,[52] with entire disregard of the frequency with which it is bought and sold. Such general statements are responsible for the frequent judicial hostility toward overdue paper, and the desire to subject it to all infirmities and not merely to equitable defenses.

Fortunately Chief Justice Shaw has put the rule as to equitable defenses on a definite and rational basis:[53]

"The question instantly arises, Why is it in circulation, — why is it not paid? Here is something wrong. Therefore, although it does not give the indorsee notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry."

Other judges state the reason for constructive notice well:

"Ordinarily a bill or note when due becomes *functus officio*, because it was made to be paid at maturity, and if it fails of its intended operation and effect, the presumption is that it is owing to some defect which has furnished a sufficient reason to the party apparently chargeable for not having punctually performed his obligation." [54]

"The bare fact that a negotiable instrument is unpaid at its maturity, is a circumstance sufficient to raise the presumption of fraud, and that there exists some valid legal reason why it was not paid. The law of merchants being the law of honor, all bills and notes . . . it is presumed, will be promptly paid." [55]

Therefore, because all the contracts on the instrument would naturally be performed at maturity, the equitable defenses of all parties are let in after maturity. It is certain that the primary party to the instrument can set up such defenses, and the peculiar doctrine of a recent Washington case that only equities against the payee run after maturity, so that payment to an indorsee is no defense against the *bonâ fide* purchaser, is indefensible.[56] On

[52] Thomas *v.* Kinsey, 8 Ga. 421, 433 (1850); Chester *v.* Dorr, 41 N. Y. 279 (1869); Etheridge *v.* Gallagher, 55 Miss. 458, 467 (1877); Henderson *v.* Case, 31 La. Ann. 215, 216 (1879); Greenwell *v.* Haydon, 78 Ky. 332, 347 (1880); Midland *v.* Hitchcock, 37 N. J. Eq. 549, 558 (1883).

[53] Fisher *v.* Leland, 4 Cush. (Mass.) 456 (1849).

[54] Morgan *v.* United States, 113 U. S. 476, 500 (1885) per Mathews, J.

[55] Davis *v.* Bradley, 26 La. Ann. 555, 556 (1874) per. Taliaferro, J. Unfortunately this case and the preceding do not realize that the reason stated limits the effect of constructive notice to equitable defenses only.

[56] Reardon *v.* Cockrell, 54 Wash. 400, 103 Pac. 457, 50 L. R. A. (N. S.) 87 (1909). *Held*, the maker cannot set up a part payment to the first indorsee who was then

principle, a secondary party who is sued by an indorsee after maturity ought also to be able to avail himself of any equities of his own, although it is sometimes suggested that only the equities of the primary party run.[57] Of course the failure of an indorser to pay the instrument is a much weaker evidence of defenses than dishonor by a maker or acceptor, yet it would be natural for the indorser to take it up and protect his credit unless he felt sure of defeating an action against him. A secondary party expects to pay at maturity if at all and safeguard himself then, by recourse to the primary party, so that transactions after maturity should not cut off defenses which he had at maturity. Such a result would be highly prejudicial to him, forcing upon him the choice of taking up at maturity an instrument on which he has a defense or of running the risk of subsequent liability to a *bonâ fide* purchaser. Furthermore, "the maker often signs for accommodation, and the apparent indorser may be principal." [58] It would be especially unjust in such a case if the indorser's defenses could be cut off, for he would have no recourse against the maker. There is very little authority, but this except for three cases supports the conclusion just reached.[59] It is hardly necessary to add that secondary parties

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holder. See also Wynn *v.* Kelly, 22 La. Ann. 594, 595 (1870). The cases cited in Reardon *v.* Cockrell and the L. R. A. note thereto as in accord are all with the possible exception of Vinton *v.* Crowe, 4 Cal. 309 (1854), set-off decisions, which do not necessarily apply to other equities, set-off being a procedural matter depending on statute and no defense (even if against the payee) to a purchaser after maturity in England and many states.

Contra to Reardon *v.* Cockrell; Eaton *v.* Corson, 59 Me. 510 (1871), payment; Bond *v.* Fitzpatrick, 4 Gray (Mass.), 89 (1855), payment or equitable discharge.

The cases holding that a set-off of the maker against an indorsee is a defense would *a fortiori* allow other defenses between maker and indorsee. Harris *v.* Burwell, 65 N. C. 584 (1871); Wyman *v.* Robbins, 51 Ohio St. 98, 37 N. E. 264 (1894).

It is possible that the doctrine of Reardon *v.* Cockrell can be traced to STORY ON PROMISSORY NOTES (6 ed.), § 178: "If the transfer is after the maturity of the Note, the holder takes it as a dishonored Note, and it is affected by all the equities between the original parties."

[57] This seems to be the view of Francis R. Jones in his article in 11 HARV. L. REV. 40; see page 42, top. It is also held by Hill *v.* Shields, 81 N. C. 250, 253 (1879); Parker *v.* Stallings, Phil. L. (N. C.) 590 (1868); Sanderson *v.* Crane, 2 Green (14 N. J. L.), 506, 509 (1834).

[58] Zeis *v.* Potter, 105 Fed. 671, 675 (C. C. A. 7th, 1901).

[59] *Equitable Defenses of Secondary Parties run after Maturity.*

Drawer: Serrell *v.* Derbyshire, 9 C. B. 811 (1850), *semble;* Rounsavel *v.* Scholfield, 2 Cranch, C. C. 139 (U. S.) (1817); Skillman *v.* Titus, 32 N. J. L. 96 (1866);

can always set up want of presentment and notice against a purchaser after maturity.

A distinction must be taken between the defenses of parties who become liable before maturity and after maturity. The instrument takes a new lease of life with respect to an indorser after maturity, and his equitable defenses are not let in until a reasonable time after he indorses, although the paper is apparently overdue.[60] The same is true of a drawer [61] or even a maker or acceptor who becomes bound after the date of payment. The promise is to pay on demand.[62] A contract made after maturity has a special maturity of its own, *i. e.*, a reasonable time after execution, and *bonâ fide* purchasers within that time will be protected from all equities of the party who signed, even equitable defenses.

It must also be remembered that the defendant can set up only his own equities when sued by a purchaser after maturity. Thus an indorser cannot set up the defenses of a maker or prior indorser, because he has made a fresh promise. Nor can a maker set up fraud upon an indorser because that is not an equitable defense on the maker's contract, and though the indorser has an equity of ownership, it was cut off by the *bonâ fide* purchase even though the latter was after maturity.[63]

It is clear from the preceding discussion and especially from the language of Chief Justice Shaw and the other judges quoted that a purchaser after maturity is put on inquiry as to equitable

Bridgford *v.* Crocker, 3 Th. & C. (N. Y.) 273 (1874); Cowing *v.* Altman, 1 Th. & C. (N. Y.) 494 (1873); Lancester *v.* Woodward, 18 Pa. St. 357 (1852).

Indorser: Crossley *v.* Ham, 13, East. 498 (1811); Chester *v.* Dorr, 41 N. Y. 279 (1869). *Contra*, Wynn *v.* Kelly, 22 La. Ann. 594 (1870); but the defense here was collateral, like set-off; Hill *v.* Shields, 81 N. C. 250 (1879); indorser after maturity, and purchase may have been within a reasonable time, but the opinion allows only maker's equities to run; Parker *v.* Stallings, Phil. L. (N. C.) 590 (1868).

[60] An indorser after maturity is held to be liable only for the price paid him, in McAdam *v.* Grand Forks, 24 N. D. 645, 140 N. W. 725 (1913), *sed quaere.*

[61] Boehm *v.* Sterling, 7 T. R. 423 (1797).

[62] NEGOTIABLE INSTRUMENTS LAW. § 7, enacts the common law; "Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand."

[63] An accommodation indorser, being a surety, can set up the equitable defense of his principal, the maker. Livermore *v.* Blood, 40 Mo. 48 (1867).

The difficult question whether jurisdictions which hold that equities of ownership are *not* cut off after maturity should allow such equities to be set up as defense by a prior party is discussed on page 1141, *infra*. See notes 122, 123, 124.

defenses. But his duty to inquire stops there. The reasoning of the courts does not apply to equities of ownership. The effect of maturity as notice is limited by the fact that maturity does not terminate the life of a negotiable instrument as property. Equities of ownership relate to the instrument as property, but maturity, like equitable defenses, relates to liability on the contracts. It is a term of the respective promises of the parties. The possession of an overdue instrument is a clear indication that there is something the matter with the promises, whether it be a defense or only financial embarrassment or procrastination, but it does not indicate in any way that the possessor wrongfully acquired the instrument from a previous owner. Maturity has an obvious relation to liability on the contracts, and therefore brings into play the equitable defenses which prevent liability. But maturity has no effect upon the existence of the instrument as a thing of value, or its transferability. It is a chattel as before, legal title passes as before, and equities of ownership are cut off by purchase of the legal title for value without notice just as in the case of any other chattel. The purchaser must ask why the instrument was not paid, or take the risk that there may have been a good reason for default, but nothing has happened to make him ask why the transferor instead of some other man has the instrument. Consequently, on correct principles, the purchaser after maturity, unless sheltered under the title of a preceding holder in due course, cannot sue upon any contract as to which there is an equitable defense, but can keep the instrument and sue on contracts which are free from such defenses. Maturity alters contracts which are subject to defenses, crystallizing the defenses, as it were, but contracts not subject to defenses continue as before. The *bonâ fide* purchaser after maturity gets the instrument as it is and owns each contract for better, for worse.

This solution of our problem, that equities of ownership are still cut off after maturity but equitable defenses run after maturity, has been ably presented in the recent Federal case of *Wolf* v. *American Trust Company*:[64]

"An indorsement of a negotiable instrument to a named indorsee has two aspects. In one, it is a contingent contract of debt as complete

[64] 214 Fed. 761, 765 (C. C. A. 7th, 1914) per Baker, J.

and definite as if the terms thereof were written out in full above the indorser's signature; and in the other, it is a conveyance to the indorsee of the legal title to the instrument considered as a species of property — as perfect a conveyance as is the ordinary bill of sale of the ordinary chattel. Concerning the indorser's liability on his contingent contract of debt, the maturity of the instrument may or may not be important. As to the validity of the indorser's conveyance of the legal title, the maturity of the instrument is inconsequential. And so in this case, inasmuch as appellee is not counting on appellant's contingent contract of debt but is only asking him to respect his conveyance of the legal title, the principle applies, which is common to the law of all kinds of property, that the innocent purchaser of the legal title is protected again t secret equities respecting the title."

III. Alternative Views of Overdue Paper

The preceding portion of this article solves the problem of the *bonâ fide* purchaser after maturity in accordance with what is believed to be the true theory of negotiable paper, which involves (1) the classification of equities and (2) the passage of legal title to the possessor within the description of the instrument. Other theories as to negotiable instruments have been mentioned, and we must now consider the consequences of the application of these theories to overdue paper, and the views actually adopted by the courts in overdue paper cases.

The estoppel theory reaches the same conclusions as this article by a different course of reasoning as to legal title and the same views as to the two kinds of equities.[65] As Mr. Ewart forcibly expresses it:

"The holder of a bill to bearer appears to be the owner of it —

[65] Ewart on Estoppel, 423–24.

"Apart from any asserted *ipse dixit* of the law merchant, the only reason for declaring that the holder of an overdue bill or note takes it subject to equities is that he has notice that payment has been refused; this refusal may have been because of the existence of equities; the purchaser should have inquired; if he had he would have discovered equities; he therefore takes with notice actual or constructive of them, and for that reason ought to hold subject to them. . . .

"But we must remember a distinction. The equities of which a transferee is relieved are (1) the equities of the obligors, and (2) the equities of the true owner of the document — or rather the legal title of this true owner. Now the reason for cutting out equities applies very forcibly to the former of these cases; but it has no relation to the latter."

The rest of the passage is quoted in the text above, and in note 99, *infra*.

'the property and the possession are inseparable.' Due or not due does not affect or modify this appearance. The true owner is as much estopped by ostensible ownership of a dead horse (overdue as we may say) as of one still able to trot."

The decisions with regard to overdue paper are much influenced, however, by a very different doctrine from the legal title theory or Mr. Ewart's estoppel theory. This doctrine denies that the wrongful possession of negotiable paper necessarily confers a real or apparent legal title; the wrongdoer, especially if a thief, has only an authority or power to pass title, which terminates abruptly at maturity. After that period, the paper is said to be subject to a general rule that title cannot pass without the consent of the owner. This doctrine also ignores the distinction between equitable defenses and equitable claims to ownership, lumping them all together as "equities." The result is a strong body of judicial opinion, which takes the red flag view of maturity and regards it as warning the purchaser of everything that is wrong about the instrument. This view has long been held in England [66] and is codified by the Bills of Exchange Act, 1882:[67] "Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title [68] affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had."

This English view, as we may call it, is evidently at the opposite pole from the view advocated in this article. Instead of protecting the *bonâ fide* purchaser from all claims to the ownership of the instrument, it subjects him to all such claims, whether made by indorsers, prior owners who did not indorse, or persons who never had any possession of the instrument, and whether the wrongdoer be a thief, a defrauder, or an absconding custodian.

[66] *In re* European Bank, L. R. 5 Ch. App. 358 (1870). [67] § 36 (2).

[68] CHALMERS ON BILLS OF EXCHANGE (7 ed.), page 129, says that "defect of title" was used to mean "equity attaching to the bill," since that term was unknown in Scotch law, and the Act extended to Scotland. The Scotch law did not subject the *bonâ fide* purchaser after maturity to equitable claims or defenses until Parliament applied the English rule to Scotland in 1856. Mercantile Law (Scotland) Amendment Act, 19 and 20 Vict. c. 60, § 16: "When any Bill of Exchange or Promissory Note shall . . . be indorsed after the Period when such Bill of Exchange or Promissory Note became payable, the Indorsee of such Bill or Note shall be deemed to have taken the same subject to all Objections or Exceptions to which the said Bill or Note was subject in the Hands of the Indorser." See note 117, *infra*.

Although many American courts give apparent allegiance to this doctrine and have adopted its catch-words, that an overdue instrument is mere personal property, title to which cannot pass without the consent of its owner, so that the paper is bought after maturity subject to all infirmities,[69] nevertheless the English view is so harsh upon innocent purchasers that our judges shrink from applying it, at least in its extreme form. Consequently the American law inclines to protect the *bonâ fide* purchaser after maturity, although the authorities are by no means harmonious. The complete protection advocated in this article is not given by any State with the probable exception of North Carolina,[70] but in view of the strong statement of the Circuit Court of Appeals in the Seventh Circuit in *Wolf* v. *American Trust Company*[71] and the concurring opinion of Justice Swayne in *National Bank* v. *Texas*[72] in the Supreme Court, it is possible that the Federal courts will eventually cut off all equities of ownership. And in most States it is certain that there are circumstances under which the *bonâ fide* purchaser will get a good title, although the decisions differ very much as to what those circumstances are.

We can roughly place the cases in three divisions, according to the grounds on which they cut off equities of ownership. These grounds are not mutually exclusive. A jurisdiction may cut off equities on all three grounds, or it may recognize only one ground and repudiate the others, and so forth. If it cuts off equities at all, it leans in the direction of the conclusions of this article, although it may draw the line at a point which seems questionable.

1. The first view determines whether protection shall be given to the *bonâ fide* purchaser after maturity by the manner in which the wrongdoer acquired possession of the instrument from his victim. Where the owner purposely transfers the paper under circumstances which enable his transferee to deal with it as if he were the true owner, the transferee can give a good title. Either he is said to have legal title subject to equities which cannot be

[69] See, for example, the cases in note 52, and also Wood *v.* McKean, 64 Iowa, 16 (1884).

[70] Parker *v.* Stallings, Phil. L. (N. C.) 590 (1868); Hill *v.* Shields, 81 N. C. 250 (1879); Bradford *v.* Williams, 91 N. C. 7 (1884). The first two cases go even farther than this article and cut off equitable defenses of an indorser.

[71] 214 Fed. 761 (1914), quoted on page 1126, *supra*.

[72] 20 Wall. (U. S.) 72, 88 (1873).

set up,[73] or else though he has not title the true owner by conferring on him the *indicia* of ownership is estopped from disputing the rights of the purchaser who has been misled.[74] Usually these two arguments are mingled without discrimination. On this view the purchaser from a thief or finder would not be protected,[75] either because no legal title passes with this kind of transfer, or because legal title never passes to a wrongdoer after maturity and in these cases the true owner is not estopped to set up the wrong. This voluntary transfer view has the largest judicial support of any ground for protection of the purchaser after maturity. It is adopted in many cases,[76] and although there are numerous decisions which allow the owner who voluntarily parted with overdue paper to regain it,[77] the estoppel point was not raised, or else the court recognized the validity of the principle of estoppel but held it was not created by the facts of the particular case.[78] On the other hand, there is no instance of involuntary transfer by the owner where the *bonâ fide* purchaser was actually protected by a court,[79] unless we except *National Bank* v. *Texas*.[80] The purchaser from a thief or finder gets his only encouragement from dicta and legal reasoning. The voluntary transfer view consequently takes its stand at the high-water mark of judicial protection for the *bonâ fide* purchaser after maturity.[81]

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[73] Morton, J., in Gardner *v.* Beacon Trust Co., 190 Mass. 27, 30, 76 N. E. 455 (1906), citing White *v.* Dodge, 187 Mass. 449, 73 N. E. 549 (1905), which practically adopts the legal title theory, since it compares the wrongful transfer to the conveyance of a stock of goods which the vendor had obtained by fraud. Gardner *v.* Beacon itself practically rejects the view that maturity gives notice of equitable claims, though in the same breath it says the purchaser is subject to all equities. Morton, J., shrank from the plunge.

[74] Young *v.* MacNider, 25 Can. S. C. 272, 279 (1895), per Strong, C. J.

[75] See the dicta as to theft and finding in cases which recognize voluntary transfer as a ground of protection, Appendix, Group B 4.

[76] Appendix, Groups A 2 and A 3, except Wolf *v.* American, and the first two North Carolina cases.

[77] Appendix, Groups B 5, 6, 7.

[78] Osborn *v.* McClelland, 43 Ohio St. 284 (1885), and the Illinois cases against the *bonâ fide* purchaser.

[79] Appendix, Groups B 1, 2, 3.

[80] See Appendix, Group A 1.

[81] The voluntary transfer view in its most liberal form corresponds with the protection given to the *bonâ fide* purchaser for value of a document of title by the Uniform Sales Act, § 38 and the Uniform Warehouse Receipts Act, § 40. It is significant that the Uniform Bills of Lading Act, §§ 31, 32, and the Uniform Stock Transfer Act, § 5, protect even the purchaser from a thief.

In spite of the fact that this view reaches a just result in a large number of cases, it is open to two serious objections. First, it separates the possession of the instrument from the power to give a good title, unless it can find some consent on the part of the true owner. Since the last thing that owner really wants is to be deprived of his property wrongfully, the interpretation of his mental attitude becomes a difficult and arbitrary matter. The "authority" given by him to the wrongdoer was wholly fictitious before maturity, and is still far from genuine after the paper is overdue. A Rhode Island court once allowed a will to be completely rewritten after the testator's death by the consent of all the persons interested, and then set itself to construe certain ambiguous passages in the new document and find out "the intent of the testator." Courts which adopt the "authority" theory are similarly embarrassed in their efforts to ascertain the transferor's intention.

Consequently the courts do not agree as to the kind of voluntary transfer which will pass title to the wrongdoer or estop the owner. If consent is obtained by fraud, Indiana, Massachusetts, and Minnesota protect the purchaser,[82] while Illinois and Mississippi class the defrauder with a thief,[83] saying that no title whatever passes, and that even if *bonâ fide* purchase after maturity cuts off equities it does not cut off the legal title. Once the Illinois court had gone outside the four corners of the instrument and announced that the will of the victimized owner must be taken into consideration, it began to draw very fine distinctions to determine whether or not the wrongdoer was "clothed with the *indicia* of title." The result of the Illinois cases is that a pledgee [84] or an agent for safe-keeping and receipt of interest [85] is *purposely* given title, but an agent for renewal is not.[86] Offhand, we should expect the distinction, if

[82] Moore *v.* Moore, 112 Ind. 149, 13 N. E. 673 (1887); Gardner *v.* Beacon, 190 Mass. 27, 76 N. E. 455 (1906); Cochran *v.* Stewart, 21 Minn. 435 (1875).

[83] Etheridge *v.* Gallagher, 55 Miss. 458, 469 (1877); Y. M. C. A. *v.* Rockford, 179 Ill. 599, 604, 54 N. E. 297 (1899); citing Henderson *v.* Case, 31 La. Ann. 215, 216 (1879), in which Spencer, J., said: "We do not think that the authorities citied by defendant to the effect that 'no collateral equities can effect an assignee of commercial paper transferred after maturity' can be applied to the case where there is a *total want of right* in the transferor."

[84] Y. M. C. A. *v.* Rockford, 179 Ill. 599, 54 N. E. 297 (1899).

[85] Justice *v.* Stonecipher, 267 Ill. 448, 108 N. E. 722 (1915, under N. I. L.).

[86] Hide *v.* Alexander, 184 Ill. 416, 56 N. E. 809 (1900); Merchants *v.* Welter, 205 Ill. 647, 68 N. E. 1082 (1903). See also Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644 (1885).

there is any, to be just the other way; for the authority to collect small amounts of interest is much narrower than the authority to surrender the instrument itself and take another with a later time for payment.

If estoppel be the ground of these cases, the apparent ownership of the wrongdoer and the reliance of the purchaser are just the same, however the owner lost possession. There is no real basis for an estoppel in these cases except the mere possession of the wrongdoer, and that exists regardless of delivery. If an overdue instrument is only a chattel, estoppel is surprising, for possession of other chattels does not *per se* create estoppel; but if estoppel is created by the possession, it ought to exist in all cases of possession, without these fine distinctions as to the owner's mental attitude and consent.

If passage of title be the ground of these voluntary transfer cases, then title ought to pass whether the victim consents or not, just as before maturity. There is no true consent to be deprived of his ownership in any case. The limits of the wrongdoer's power are fixed by law and the terms of the instrument. The attempt to define them by the intention of the victim only results in uncertainty. There is no reason in nature for giving a thief less power to pass title than a cunning swindler or an embezzler, and as for the finder, it is hard to see why he should be classed with a thief at all.[87] Since a finder's possession entitles him to sue, like the chimney-sweep who discovered the jewel,[88] the finder of a negotiable instrument payable to bearer has before maturity every incident of legal title, and maturity should have no effect on his legal title, especially as he is not a wrongdoer. After maturity he ought to be in as good a position as the agent for collection, who can admittedly cut off the true owner's equities by virtue of his legal title. And when the courts say that there is no intention to pass title to a defrauder or an agent for renewal or an accommodated friend, we have confusion worse confounded.

A second difficulty about the voluntary transfer view is its inability to decide whether maturity is or is not constructive notice of claims of

[87] The only case as to a finder seems to be Vairin *v.* Hobson, 8 La. 50 (1835), denying protection to the *bonâ fide* purchaser, but the dicta in Appendix, Group B 4, class a finder with a thief.

[88] Armory *v.* Delamirie, 1 Stra. 505 (1722).

ownership. If maturity is not such notice, then the *bonâ fide* purchaser ought to be protected in all cases, as I contend. If it is notice, it puts the purchaser on inquiry in all cases, and there can be no estoppel, since estoppel presupposes justifiable reliance. The purchaser is not misled to overlook the danger, since the red flag of maturity waves before his eyes. Consequently it is incorrect for the voluntary transfer cases to seek support as they often do from *McNeil* v. *Tenth National*,[89] and similar decisions,[90] which protect from equitable claims of ownership the *bonâ fide* purchasers of tangible choses in action like stock certificates and insurance policies, on the ground that the true owner is precluded by his conduct from asserting his title. Such instruments have no maturity to give warning of defects of title. The analogy is proper only if you limit the effect of maturity to equitable defenses. These voluntary transfer cases let in all equities at the front door and then try to shut them out at the back.

The objection was well put by counsel in a Maryland case:[91]

"The intervention of the equitable principle that 'where one of two innocent parties must suffer, *he* must suffer who misled the other, cannot be successfully invoked by the [purchaser after maturity], because he is not, in the eye of the law, an innocent party. [His] position is worse than that of an assignee of a mere *chose in action* under similar circumstances, for the fact that the note was overdue when transferred to him is of itself *notice* of the fraud, and of the consequent defect in [his transferor's] title. How can a *particeps fraudis* take advantage of this equitable principle?"

Most of the voluntary transfer cases start with the assumption that the purchaser of an overdue instrument takes it "subject to all the equities attached to it." If so, he is not a *bonâ fide* purchaser without notice and ought not to have the benefit of any estoppel or take free from the very equities to which *ex hypothesi* he is subject.

The only way to reach a sound result is to recognize squarely that maturity has nothing to do with equities of ownership. The

[89] 46 N. Y. 325 (1871). It is important to remember that this case rests upon estoppel and not upon Kent's latent equity doctrine, which is overruled in New York.

[90] 30 HARV. L. REV., 104 notes 14, 16, and 17; Williston's Wald's Pollock on Contracts, 294, note 88.

[91] Eversole *v.* Maull, 50 Md. 95, 97 (1878).

difficulties of the voluntary transfer view arise from its reluctance to adopt the two fundamental propositions, that there are two kinds of equities, and that the capacity to give a perfect title passes with possession within the terms of the instrument.

2. A second view rejects the English rule that the equities of all persons run after maturity, and lets in only the equities of those persons of whom the prospective purchaser can fairly be required to make inquiry. Thus, it would be extremely harsh to subject him to the claims of persons whose names do not appear on the instrument, who never had possession of it, and were not in the chain of title at all. It is plain that unlimited diligence on the prospective purchaser's part would probably fail to disclose such claims. As Chancellor Kent puts it,[92] "He has not any object to which he can direct his inquiries." Questions addressed to the transferor will hardly elicit the fact that he is a defaulting trustee or obtained the instrument in fraud of the creditors of a prior holder. Yet by the English view, the *cestui que trust* or the creditors could get the instrument from the purchaser. In the leading English case,[93] the agent of a bank wrongfully used its funds to buy overdue bills, which he sold to an innocent buyer. The bank's claim was undiscoverable, for the only person who knew of it, the agent, would not have revealed his misconduct, yet the bank prevailed. There are several cases in this country which refuse to let in such "latent" equities,[94] although authority the other way is not lacking.[95] Since there is no voluntary transfer in most of these cases, there would be no chance to work out an estoppel [96] if the latent equity view be rejected.

It is possible to extend this latent equity view even farther and protect the *bonâ fide* purchaser from the equities of prior owners if the instrument was payable to bearer or indorsed in blank before they acquired it. Their names do not appear on the paper, and it is only by a series of tedious inquiries that he can discover who they are. "It would even be impracticable, if not wholly impossible, for the last purchaser to investigate the history of the note suffi-

[92] Murray *v.* Lylburn, 2 Johns Ch. 441, 443 (1817).

[93] *In re* European Bank, L. R. 5 Ch. App. 358 (1870), equities of undisclosed principal.

[94] Appendix, Group A 4.

[95] Appendix, Group B 8.

[96] Turner *v.* Hoyle, 95 Mo. 337, 8 S. W. 157 (1888). See, however, Young *v.* MacNider, 25 Can. S. C. 272 (1895).

ciently to ascertain the names of all the persons through whose hands it had passed, where . . . it had been transmitted by delivery and not by indorsement. An intending purchaser, recognizing the difficulty and his liability to adverse demands . . . , would wisely refuse to have anything to do with such paper at all."[97] It is also plain that there is no duty to ask such persons about equitable defenses and incidentally learn of equities of ownership. Where a man is under no obligation to pay at maturity, the fact that the instrument is unpaid has nothing to do with him.[98] Consequently, there is a strong argument for cutting off the equities of prior owners who have not indorsed.[99] But no case protects the purchaser on this ground, and there is an overwhelming body of decisions which subject him to such equities.[100] Indeed, some of the cases find it easier to cut off a former owner who has indorsed, saying that the signature is one more element to indicate passage of title and create an estoppel.[101]

It is regrettable that there has not been more discussion in the cases[102] of this position, that a purchaser after maturity takes

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[97] Sykes Banking Co. *v.* Morris, 2 Tenn. Ch. 236, 241 (1901), holding that set-offs against an intermediate holder do not run.

[98] It is by no means certain that inquiry of the person who has the equitable claim will reveal it. The owner may not be aware of the fraud at the time of the purchase. See Proctor *v.* McCall, 2 Bailey (S. C.), 298, 302 (1831).

[99] EWART ON ESTOPPEL, 423: "The holder of an overdue note payable to bearer offers it for sale; the intending transferee inquires of all persons liable upon the note as to equities or claims, and is told that there are none; he then buys the note; afterwards some stranger demands it from him, saying that the transferor was his agent for custody merely; that it was overdue when it was transferred; and therefore that the transferee took it subject to all defects. It is at once apparent that the principle of notice, actual or constructive, will not aid this claimant."

[100] All the cases in Group B 1 of the Appendix; all but one in B 2; the case in B 3; the Illinois, Louisiana, New Hampshire, and Texas cases in B 5; the Georgia, Illinois, Maryland, first New Hampshire, New Jersey, New York, and Texas cases in B 6; and the case in B 7—twenty-seven decisions in all. In the three Illinois cases which do not protect the purchaser, the paper was not indorsed by the owner; but he did indorse in the two Illinois cases in note 101 which do protect the purchaser.

[101] Y. M. C. A. *v.* Rockford, 179 Ill. 599, 604, 54 N. E. 297 (1899); Kempner *v.* Huddleston, 90 Texas, 182, 185, 37 S. W. 1066 (1896). Justice *v.* Stonecipher, 267 Ill. 448, 452, 108 N. E. 722 (1915). And see 2 L. R. A. N. S. 769–70, note. Compare Eversole *v.* Maull, 50 Md. 95 (1878) with McKim *v.* King, 58 Md. 502 (1882). See also the cases which estop the owner of a non-negotiable chose in action who transfers it by writing. 30 Harv. L. Rev. 104, note 17.

[102] Zeis *v.* Potter, 105 Fed. 671, 675 (C. C. A. 7th, 1901) Woods, J., *semble:* "The purchaser of overdue or non-negotiable paper, if required to inquire of the makers

subject to all equities of secondary parties and no others. Much can be said for its validity, and indeed its advocates might direct a powerful attack against the solution of the problem advocated by this article. If the purchaser after maturity is put on inquiry as to the equitable defenses of indorsers, they might argue that according to Chief Justice Shaw [103] he is then affected with notice of all the facts which he would have learned by such an inquiry. Any indorser who has an equitable defense has also in most instances an equity of ownership, and both rest on the same facts. For example, if he was induced to indorse by fraud, inquiry as to his equitable defense would disclose the circumstances of the fraud, and a purchaser knowing those facts would at once be aware of the claim for restitution of the instrument. He would have notice simultaneously of the equitable defense and the equitable claim, and if he purchased would take subject to both. Actual notice of one is necessarily actual notice of the other, and consequently it is objectionable to maintain that maturity gives constructive notice of the indorser's equitable defenses but not of his equitable right to the ownership of the instrument.

My reply would be, that maturity is only constructive notice, and constructive notice is not actual notice, indeed not notice at all, but simply a convenient fiction to express a rule of law that the person affected takes certain risks if he goes ahead with his purchase or other transaction. The extent of the risk depends on the nature of the transaction or the particular fact which gives him warning, "puts him on constructive notice." He is not held to know the facts of which he has notice. The owner of land takes the risk of a prior recorded mortgage, but he is not guilty of fraudulent mis-

whether they have any defense, may equally well be required to inquire into the rights of remote indorsers or others whose names appear on the paper. The payee and each successive indorsee, though he has parted with possession and title, may yet have an interest which, as against all but innocent purchasers for value and without notice, equity would protect; and, if convenience of inquiry is equivalent to notice of the rights of the maker, why not of any other, [when,] by reason of his name being on the paper, or by other means, the proposed purchaser is notified that he once had, and therefore may yet have, an interest? The maker often signs for accommodation, and the apparent indorser may be in fact the principal. The reasonable rule would seem to be that the purchaser of such paper should take subject to the equities of all who appear or are known to have had an interest in it."

[103] Baxter v. Little, 6 Met. (Mass.) 7, 11 (1843). "By this fact he is put upon inquiry, and therefore he shall be bound by all existing facts, of which inquiry and true information would apprise him."

representation if he says the land is unincumbered. In the same way, maturity does not actually inform the purchaser of defenses, but merely throws upon him the risk of them and of nothing else. If the purchaser is anxious to hold some wealthy indorser, he will be wise to go to him and make sure *he* has no defense. Then that contract will be safe, and the purchaser need not take the time to interview other parties. But if all equities of indorsers run, the omission to ask one insolvent indorser would be penalized by a loss of rights on all the contracts, should that indorser have been deprived of the paper by fraud. The prospective purchaser would have to ask all down the line to protect himself, and if he could not find one indorser, he would have good reason to worry for fear that this might be the very man who would eventually turn up and take the instrument away from him. On business principles, each promise should stand by itself, good or bad. The conditions of trade in the note market require speedy transactions and make a protracted series of inquiries impossible. Consequently the buyer should be obliged to see only the parties whom he particularly wants to hold. If he omits an indorser, he takes the risk that that man may have a defense, but rights on other contracts remain unaffected.

An extremely liberal view, suggested in a few cases,[104] is that dishonor simply concerns the maker or drawee. The purchaser after maturity is bound to ask the primary party the reason for non-payment, and if he does not ask, he is subject to whatever equities he would have learned about from the maker or drawee. The payee or other holder who loses the instrument or is deprived of it by some fraud must notify the primary party not to pay if he wishes to preserve his rights. The purchaser is taken to know all that the maker or drawee knows, and no more. The reason for non-payment may be an equitable defense of the maker's or it may be theft from the payee, who has stopped payment. This view, though ingenious, would be hard to apply. Questions

[104] See the authorities cited in note 57, *supra;* Proctor *v.* McCall, 2 Bailey (S. C.) 298, 302 (1831). Harper, J.: "It would seem much more reasonable, to require the payee or true owner to give notice of the loss to the party liable to pay."

Y. M. C. A. *v.* Rockford, 179 Ill. 599, 605, 54 N. E. 297 (1899), the passage quoted in note 107, *infra.*

In National Bank *v.* Texas, 20 Wall. 72, 77 (1873) it appears that the purchaser made inquiries of the maker.

about what the maker knew, whether the purchaser did inquire, and so on, would continually arise. Moreover, the equitable defenses of the indorser who did not notify the maker would be cut off after maturity. Incidentally, the fact that the maker or drawee knows of a theft from the payee does not necessarily justify his refusal to pay the instrument, for the payee's equity may conceivably be cut off. Whether it is cut off, is the very question now under discussion.

The latent equities view is sound in maintaining that the equities of outsiders ought not to be let in, but its supporters admittedly rest it on *Murray* v. *Lylburn*,[105] so that there is danger that courts which reject Kent's doctrine as to non-negotiable choses in action will treat this view in the same way. However, there is a clear distinction between mere choses in action and overdue paper, and if the judges can be made to perceive this, the unjust doctrine of *In re European Bank* [106] may be permanently repudiated in the United States. Furthermore, the latent equity argument is sometimes used by the cases to reënforce the estoppel argument, and secure protection for the purchaser even against the equitable claims of prior owners.[107]

3. It is arguable that the rights of the *bonâ fide* purchaser after maturity should depend on the time at which the defrauded owner parted with the instrument. If it was then overdue, the fraud could not have been a reason for non-payment, and the purchaser should be protected. Also the "authority" given before maturity may be considered to terminate at maturity, but if it does not commence till after the instrument is overdue, it is still in full effect at the time of the transfer to the *bonâ fide* purchaser.[103]

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[105] 2 Johns. Ch. 441 (1817).

[106] L. R. 5 Ch. App. 358 (1870).

[107] Y. M. C. A. *v.* Rockford, 179 Ill. 599, 605, 54 N. E. 297 (1899). Wilkin, J. (after speaking of the rule that the maker's equities are not cut off):: "To extend the same protection to whoever may have acquired some collateral interest in the paper, in the absence of actual notice of the same to a transferee, would be to charge him with knowledge of a fact not within his power of ascertainment and practically destroy the negotiability of overdue instruments. . . . Persons dealing in such securities can without difficulty inquire of the makers if any defenses exist against them, but more than that it is not practicable to do. Of course, it would not be possible to discover, even by the utmost diligence, all persons that might have equitable rights in the subject matter."

[108] Eversole *v.* Maull, 50 Md. 95, 98 (1878), counsel for the purchaser, *arguendo;*

On the other hand, it has been pointed out that if the wrongdoer took the instrument before maturity, it was still negotiable in the fullest sense, and consequently he got the usual title or power which enables him to confer a good title on his transferee. The cases which declare that the theft of an overdue instrument gives no title cannot apply to a theft before maturity.[109] The magic of negotiability is still operative. This argument applies still more forcibly if the transfer to the wrongdoer was voluntary.

Clearly a distinction which works both ways is not worth much, and it is not surprising that the courts have paid no attention to it[110] with the exception of one case in Maryland,[111] which refused to safeguard a transferor after maturity, and even in Maryland the distinction was overlooked by a later case which did allow him to recover.[112]

It should be observed, however, that an owner who indorses the instrument after maturity makes it payable on demand, giving it a second maturity so far as he is concerned, *i. e.*, a reasonable time after he transfers. A *bonâ fide* purchaser for value within that reasonable time is a holder in due course as regards that indorser and should consequently be free from all his equities.[113] To this extent the third view seems sound.

This discussion of the authorities leads to the conclusion that a combination of the first and second views is probable. The *bonâ fide* purchaser of overdue paper may hope for protection from the claims of former owners who voluntarily transferred the paper,[114] and from the equities of outsiders,[115] although the decisions are sharply divided on both points. Once this result is firmly estab-

and Miller, J., adopted his argument, saying, page 105, "The endorsement was made and the note delivered to (the agent for collection) *after its maturity*, so that the trust reposed in him by (the owner) *originated* after the note had matured, and was *continuing* at the time (the agent) sold it to (the purchaser)." This distinction has not been adopted in any other case. See 2 L. R. A. N. S. 768–69, note.

[109] So argued by Francis R. Jones, 11 HARV. L. REV. 44.

[110] The groups of cases in the Appendix show that it makes no difference as to the position of the owner whether he parted with the paper before or after maturity.

[111] Eversole *v.* Maull, 50 Md. 95, 105 (1878).

[112] McKim *v.* King, 58 Md. 502 (1882), not citing Eversole *v.* Maull.

[113] See the discussion on page 1125 and note 61. If equitable defenses are cut off, it is clear that equities of ownership ought to be, but the point has never been raised in litigation.

[114] Appendix, Groups A 2 and A 3. *Contra*, Groups B 5, 6, 7.

[115] Appendix, Group A 4. *Contra*, Group B 8.

lished, it will be only a step to include theft and finding and cut off equities of ownership altogether.

In view of the great conflict of authorities, however, it would be desirable to adopt a definite rule by legislation through an amendment to the Negotiable Instruments Law. That Act apparently leaves our problem untouched. The last sentence of section 16,[116] goes a long way toward the legal title theory by making the want of delivery an equitable defense even if at the inception of the instrument, but its terms do not extend to a purchaser after maturity, one way or the other. Section 55 is more important:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

By section 57 a holder in due course holds the instrument "free from any defect of title of prior parties." [117] This may imply that a purchaser after maturity, not being a holder in due course, is subject to such defects, but such an implication is not necessary. The law ought not to be crystallized by vague inferences, especially as the section which provides for persons who are not holders in due course subjects them only to "defenses" and does not touch claims to ownership.[118] More significant still, section 36 (2) of the Bills of Exchange Act, which codifies the English view,[119] is not copied by the

[116] "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." See note 37, *supra*.

[117] "§ 57. "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"Defect of title" may possibly mean only equitable defenses and not equitable claims, but this is unlikely, first, because it is used in conjunction with "defenses," so would naturally mean something different, and secondly, because of the broad meaning of the term in the Bills of Exchange Act. See CHALMERS (7 ed.), pp. 101, 129, who says it is equivalent to "equity attaching to the bill." Lindley, L. J., in Alcock *v.* Smith, L. R. [1892] 1 Ch. 238, 263, defines it as "subject to equities." Such a phrase in the English cases includes all kinds of equities. See note 68.

[118] § 58. "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable." The overdue instrument is certainly not "non-negotiable" in the sense of non-transferable. The word need not mean more than that equitable defenses are no longer cut off.

[119] See page 1128, *supra*.

Negotiable Instruments Law. Therefore the Act does nothing to settle the common-law conflict. Several cases decided under its provisions protect the *bonâ fide* purchaser after maturity.[120]

Inasmuch as equities of ownership run to a varying extent after maturity, according to the cases, it is useful to consider how these equities may become the basis of relief. Suppose a payee is induced by fraud to indorse in blank, and the defrauder transfers the note when overdue to a purchaser. The payee may, if the equity is not cut off, bring trover or its modern equivalent against the purchaser for the value of the instrument, or a bill in equity for restitution of the instrument itself as a unique chattel.[121] He may notify the maker not to pay any one but himself, and threaten suit, causing the maker to interplead the payee and the purchaser. Can the maker set up the payee's equity against the purchaser without interpleading the payee? He is allowed to do so in many cases,[122] but this procedure seems wrong. An issue which is really between the purchaser and the payee ought not to be fought out in litigation to which the payee is not a party. The judgment will not be *res adjudicata* as to him, so that even if the purchaser wins from the maker he may have to face a suit by the payee for the proceeds of the note. The maker should be required to interplead the payee [123] or else obtain authority from the payee to defend

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[120] Wolf *v.* American, 214 Fed. 761 (C. C. A. 7th, 1914), N. I. L. not cited; Justice *v.* Stonecipher, 267 Ill. 448, 108 N. E. 722 (1915), citing and discussing the N. I. L.; Priest *v.* Garnett, 191 S. W. 1048 (Mo. App. 1917), N. I. L. not cited. Even under the Bills of Exchange Act, estoppel is held. Young *v.* MacNider, 25 Can. S. C. 272 (1895).

[121] The legal remedy is inadequate if the purchaser is insolvent.

[122] Lee *v.* Zagury, 8 Taunt. 114 (1817); Ashurst *v.* Royal Bank of Australia, 27 L. T. 168 (1856); McCormick *v.*Williams, 54 Iowa, 50 (1880); Davis *v.* Bradley, 26 La. Ann. 555 (1874); Owen *v.* Evans, 134 N. Y. 514, 31 N. E. 999 (1892); Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644 (1885).

[123] Warren *v.* Haight, 65 N. Y. 171 (1875). In an action upon an overdue note by an indorsee after maturity against the maker, the maker was not allowed to set up the defense that the note represented the proceeds of property stolen from Mrs. N., which had come into the payee's hands with notice of the theft and been lent to the maker without notice to him.

Lott, Ch. C.: "If Mrs. N. had an *equitable* right to the money, before its loan to the defendants, and to the note subsequent thereto, that would not have been a legal defense to them if the present action had been brought by (the payee).... Mrs. N. is not a party to this action, and her rights could not be litigated in it."

Dwight, C.: "The plaintiff was the holder of the legal title to the note.... We hold that under such circumstances a party like Mrs. N. having, as is assumed, equitable rights, cannot intervene by mere notice so as to prevent the holder from collecting

in his behalf, so that the payee is the real defendant and will be bound by the judgment.[124]

Questions in conflict of laws are likely to arise because of the wide variance of views about overdue paper in different countries and among the States of this country. It is significant that the English courts, which make no distinction between equitable defenses and equitable claims when the overdue paper is in England, see the matter in a new light as soon as the paper is carried abroad, and recognize the difference between liability and ownership.[125] The liability of a party to a negotiable instrument is determined by the law governing his contract, *i. e.*, the law of the place where he became bound. Consequently, that law must determine whether or not equitable defenses are cut off after maturity. No other law can impose consequences upon his act to which he has not consented.[126] On the other hand, his liability is not directly affected by questions of ownership, for it is indifferent to him whom he pays, so long as he pays the lawful owner. Consequently, the title to an overdue instrument is not determined by the law of the place where it was made, but by the same law which governs the title to any other chattel, ordinarily the place where the chattel is and the physical act of transfer

the note, but can only assert her rights in the usual mode; that is, by becoming a party to an action in which the respective rights of the parties can be adjudicated."

Ludwig *v.* Dearborn, 8 Pa. Dist. R. 69 (1899). Beitler, J.: "The defendants cannot resist payment of the note because the indorser notified them that he has failed to get the stock for which he endorsed the note. The maker has nothing to do with that."

Jones *v.* Broadhurst, 9 C. B. Rep. 173 (1850); Young *v.* MacNider, 25 Can. S. C. 272, 281 (1895), *semble*. For the general principle that a maker cannot set up the indorser's equities, see Prouty *v.* Roberts, 6 Cush. (Mass.) 19 (1850); Carrier *v.* Sears, 4 All. (Mass.) 336 (1862); City Bank *v.* Perkins, 29 N. Y. 554 (1864); Brown *v.* Penfield, 36 N. Y. 473 (1867); Kenney *v.* Kruse, 28 Wis. 183, 188 (1871); *Contra*, Parsons *v.* Utica Cement, 80 Conn. 58, 66 Atl. 1024 (1907); 82 Conn. 333, 73 Atl. 785 (1909).

[124] This is analogous to the cases when a bailee is sued on his contract, and is allowed to set up the *jus tertii* only if expressly directed by the claimant to defend on his behalf. Biddle *v.* Bond, 6 B. & S. 225 (1865).

For negotiable instrument cases of the same sort see Adams *v.* Jones, 12 Ad. & E. 455 (1840); Merchants' *v.* Savings Inst., 33 N. J. L. 170 (1868); Talman *v.* Gibson, 1 Hall (N. Y.), 308 (1828); Fulton *v.* Phoenix, 1 Hall (N. Y.), 562 (1829). But see Warren *v.* Haight, 65 N. Y. 171 (1875), which thinks the third party must actually become a party to the litigation.

[125] Alcock *v.* Smith, L. R. [1892] 1 Ch. 238 (C. A.).

[126] *Cf.* Robertson *v.* Burdekin, 1 Ross, L. C. Comm. L. 812 (1843), in which a note payable to A and made in Scotland was held to be transferred by indorsement in England, although such a note was not transferable by English law.

takes place. In *Alcock* v. *Smith*[127] a cheque and an unaccepted bill of exchange, drawn and payable in England, were sold in Norway when overdue against the consent of the owner. Norwegian law, unlike English, cuts off all equities after maturity as well as before. The English Court of Appeals applied the Norwegian law and decided that the purchaser had an unassailable title.[128]

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[127] L. R. [1892] 1 Ch. 238 (C. A.).

[128] The obligor is indirectly affected by these questions of title. Suppose he pays the person who would be entitled by the law of England where he contracted, without notice that some one else is entitled as a *bonâ fide* purchaser by the law of the place of transfer. Apparently English law would protect the obligor, under § 72 (2) of the Bills of Exchange Act. See also Lebel v. Tucker, L. R. 3 Q. B. 77 (1867). But it is doubtful if the obligor could set up the payment as a discharge if he were sued at the place of transfer by the purchaser. He is not really discharged, but only protected by England as a matter of policy.

The reasoning in Alcock v. Smith strongly supports the contention of this article that a negotiable instrument resembles a chattel as respects equities of ownership. The case relies on Cammell v. Sewall, 3 H. & N. 617 (1858), 5 H. & N. 728 (1860), which involved chattels.

It seems clear that if the owner of an overdue instrument consents to its presence in a jurisdiction where a *bonâ fide* purchase cuts off equities of ownership, the law of that country governs and the purchaser will be protected everywhere. A more difficult question arises when the instrument is carried to such a jurisdiction without the owner's consent and sold. Two views are possible. (a) The policy in favor of the *bonâ fide* purchaser of such paper may be so strong that the owner's consent to its presence is as immaterial as his consent to the sale. He keeps such an instrument at his peril, and any jurisdiction which gets the paper into its clutches can create new rights therein and divest the old. (b) The new jurisdiction has only a physical power over the chattel but cannot affect the title of the owner who has not submitted such a title to its control. This second view finds support in Wylie v. Speyer, 62 How. Pr. 107 (1881). Coupons were stolen by bank-robbers in Northampton, Massachusetts, before maturity, and were purchased *bonâ fide* when overdue in Frankfort-on-the-Main. By the law of Frankfort, the purchaser got a good title. The New York court, however, applied the *lex fori* and held that the purchaser had no title. This is clearly wrong, and the decision can be justified only on the ground that Massachusetts law applied and prevented the thief from having power to pass title after maturity. But see Embiricos v. Anglo-Austrian Bank, L. R. [1905] 1 K. B. 677 (C. A.). A cheque payable in England was stolen in Roumania and transferred in Austria under a forged indorsement before maturity. The law of Austria was applied, and the *bonâ fide* purchaser protected. This is contrary to Wylie v. Speyer unless the law of Roumania, of which nothing was said, is like that of Austria. The second view can also be supported by certain cases involving chattels. For instance, in Edgerly v. Bush, 8 N. Y. 199 (1880), horses were removed from New York without the owner's consent and sold in Canada in market overt. It was held that the New York title was not divested. Lord Cockburn took a similar view in Cammell v. Sewall, 5 H. & N. 728, 735 (1860). But Wightman, J., and Crompton, J., in the same decision, pp. 735, 745, thought the owner's consent to presence immaterial. They said that if foreign goods were wrecked in England or brought there by a thief, the owner's title could be divested

This concludes our theoretical discussion. It will be seen that the various theories of negotiability which reach a substantially uniform result as to current paper exhibit marked divergences when applied to the abnormal facts of overdue paper. In particular, the attempt to base negotiability upon the will of the victimized owner solves nothing. If he authorizes transfer by the wrongdoer before maturity nothing in his mental attitude or overt acts limits that authority and excludes transfers after maturity. He consents to both — or to neither. And when we find jurisdictions like Illinois recognizing some transfers after maturity on the basis of the victim's so-called deliberate action, certainty has utterly vanished. The authority theory moulds the will of the owner to fit the actual rules of law as a perjured witness moulds his memory to fit the pleadings.

This "authority" theory shades imperceptibly [129] into the doctrine that the wrongdoer has a power given by law to create a good title in the *bonâ fide* purchaser before maturity, but not after maturity. Why does the law stop short at maturity? It is just as easy for it to bestow a big power as a little one. Clearly, the so-called power is only an anthropomorphic method of explaining the result that the *bonâ fide* purchaser before maturity *is* protected. The greater the protection, the greater the power. To explain the protection by the power is hauling one's self up by one's bootstraps. In short, the starting-point in the discussion should not be the wrongdoer but the purchaser. Once the law determines that he is entitled to protection on completing his acquisition of a particular kind of property, the intervention of a wrongful act in his chain of title becomes immaterial.

The legal title theory measures that protection by the terms of the instrument, which make him the owner of a direct promise. The surprising fact is not that some equities should be cut off

in market overt. In view of these conflicting opinions, the question raised by Wylie *v.* Speyer merits more consideration than can be given at this time.

[129] How imperceptibly, is shown by a typical opinion on overdue paper, Foley *v.* Smith, 6 Wall. (U. S.) 492, 494 (1867), per Miller, J. (The italics are mine.) "If (the owner) *trusted* the (wrongdoer) with her note, it was for a *purpose* which was ended when the note was protested. By indorsing the note she did *trust* the bank with full power to dispose of it before due, *although that was not intended*, and she *trusted* the bank for the return of the money to her if the money had been paid. *This trust the law implied.* But her *trust* ceased, except as to the mere possession of the note as a bailment, after the note was protested."

after maturity but that any equities should be let in, to affect *his* promise by transactions between other persons wholly unknown to him. Lord Kenyon's reluctance in *Brown* v. *Davies*[130] seems natural enough, especially as the rule of that case is unknown to a large portion of Europe,[131] where a *bonâ fide* purchaser after maturity is protected just as completely as our holder in due course.

The rule that lets in equitable defenses on overdue paper is logical but by no means inevitable. The rule that lets in equitable claims to ownership is neither inevitable nor logical nor just. The legal title theory not only conforms to the terms of the instrument, but gives the *bonâ fide* purchaser the protection to which business policy entitles him. In other words, it reaches the same result as the power theory if that theory be soundly applied, *i. e.*, if

[130] See note 51, *supra*.

[131] *Overdue Paper in the Civil Law.*

The Scotch law paid no attention to maturity with respect to equities until the statute of 1856 compressed it into the English pattern. See note 68, *supra*. Bell, Principles of the Laws of Scotland, 6th ed., 1872, § 332.

In France, the Code and subsequent statutes seem to cut off equities of ownership for all practical purposes upon instruments indorsed in blank or payable to bearer. The victim of loss or theft can recover (*revendiquer*) his instrument, but must reimburse the *bonâ fide* purchaser for the price paid. The victim can protect himself by advertising the loss or theft in the *Bulletin du Syndicat*, and purchasers after the advertisement are held to have notice. THALLER, TRAITÉ DE DROIT COMMERCIAL (5 ed.), 1916, §§ 900 *ff.*, 1481. Equities of ownership on an order instrument would apparently be cut off in the same way. The authorities differ as to equitable defenses after maturity. LYON-CAEN ET RENAULT, TRAITÉ DE DROIT COMMERCIAL (4 ed.), 1907, IV, § 135, say they are cut off, and cite cases to that effect from the Court of Cassation. They argue forcibly that maturity does not cause the essential elements of a bill of exchange to disappear. ADOLPHE PICHON, DE L'INOPPOSABILITÉ DES EXCEPTIONS AU PORTEUR D'UN TITRE À ORDRE (1904), 231, takes a position even stronger, that freedom from defenses is necessary to promote circulation before maturity. Thaller, *op. cit.*, § 1475, thinks that equitable defenses ought not to be cut off, but admits that the course of decisions is against him. Story states the French law as like the English (PROMISSORY NOTES, § 179) on the authority of Pardessus, COURS DE DROIT COMMERCIAL, I, § 352, who, however, makes the same admission as Thaller.

In Germany (BILLS OF EXCHANGE ACT, Art. 16) and Switzerland (CODE DES OBLIGATIONS, Art. 734) a special distinction is made. If no protest has been made, both equitable defenses and equities of ownership are cut off, but if protest has been made the indorsee gets only the rights of his indorser. THE COMMERCIAL LAWS OF THE WORLD, Vol. XXV, 426, London. See LYON-CAEN ET RENAULT, *op. cit.*, § 135 bis; THALLER, *op. cit.*, § 1475, note 3. Wylie *v.* Speyer, 62 How. Pr. (N. Y.) 107 (1881).

In Norway and Sweden, an overdue bill is treated exactly like a current bill with respect to equities. Alcock *v.* Smith, [1892] 1 Ch. 238, 253 (C. A.).

For the law of other countries, see LYON-CAEN ET RENAULT, *loc. cit.*; PICHON, *op. cit.*, 238, note.

the power be coextensive with the protection due the *bonâ fide* purchaser after maturity.

IV. Practical Considerations

Theory and practice are improperly opposed. If a proposition is bad in practice, then its theory is wrong. A sound theory must work well, in law as elsewhere. Let us test the solution of the overdue paper problem, which we have laboriously framed out of legal theories, by the needs of the business world. Will it promote commerce if it is definitely understood that an honest purchaser of overdue paper can keep and collect it, regardless of the wrongs inflicted on former owners by the man from whom he buys? It is rare indeed that honest man and rogue face one another in court. In this instance, as so often in the law, we have to decide between two innocent persons who have both suffered through the acts of a scoundrel who vanishes with his ill-gotten gains. Does the law care more about the owner of property which is taken away from him, or about the honest man who buys it from the wrongdoer? Clearly there is no universal rule. If the property is a watch, the law protects the owner; if it is a five dollar bill, the acquirer. On which side of the line does overdue paper fall?

Why is the five-dollar bill treated differently from the watch?

"In the conflict of interests between owners and acquirers of certain special classes of property the free circulation of which is of particular business utility, the social importance of encouraging transactions, of 'preventing property from stagnating' has resulted in legal protection of the interests of the *bonâ fide* purchaser even at the expense of the property rights of the previous owner. These special classes of property tend to become more numerous as a nation becomes more industrial and commercial in its economy, but they are as yet exceptional." [132]

When a man acquires property of one of these classes, and does everything necessary to complete the transaction, gets possession, obtains any writing that has to be done by his transferor, and then pays over the price, he can rest easy.

Current negotiable paper of course forms one of these exceptional classes, and overdue paper should also be included. It is intended to circulate after it becomes due,[133] should it for any

[132] The Enforcement of Decrees in Equity, C. A. Huston, 130.

[133] Parker v. Stallings, Phil. L. (N. C.) 590, 593 (1868).

reason remain unpaid. There is nothing inherently iniquitous about its existence after maturity, or it would not be protected by the commercial law of the Continent.[134] It is frequently overdue from insolvency or temporary financial embarrassment of the parties. Shall it then be *caput lupinum*, an outlaw, to be knocked on the head? The conditions of the money-market do not favor prolonged inquiry. It must pass free from the claims of former owners, or it is very likely not to pass at all.

This is a consideration which should never be forgotten, that every defect of title to which an honest buyer is exposed by law is a serious injury to honest prospective sellers. For every purchaser who buys and loses, another may be scared off for fear of the hidden danger, unless the seller's credit is good or conditions are such that the lawfulness of possession can be easily investigated. Such investigation of overdue paper is very difficult, and unsuited to the conditions under which most negotiable instruments are bought and sold. The buyer will not be reassured by the statement that he is safe if an honest person owned the instrument before its maturity,[135] for how can he be sure of that fact? Consequently, if the buyer takes overdue paper at his own risk, he will often not take it at all. Not only wrongdoers but innocent investors will suffer accordingly. The moment their negotiable paper becomes overdue, it will tend to remain on their hands and become a drug on the market.

Whatever depreciates overdue paper depreciates current paper. It is less valuable before maturity if subject to the ever-present danger that it may become overdue for financial reasons and then be hard to sell. The easier it is to sell through its whole life, the more attractive an investment it becomes. Any one who is offered negotiable paper before maturity will buy it more readily if he is sure of getting money on it at maturity either by payment or by selling it. As a French writer observes,[136] "It is an economic error to separate circulation before maturity from circulation after maturity. If we look at things as a whole and preserve their true re-

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[134] See note 131.

[135] Negotiable Instruments Law, § 58 (last sentence); Chalmers v. Lanion, 1 Camp. 383 (1808).

[136] A. PICHON, DE L'INOPPOSABILITÉ DES EXCEPTIONS AU PORTEUR D'UN TITRE À ORDRE, p. 336. Paris, 1904.

lations, the rapidity of circulation before maturity depends in part upon the rapidity of circulation after maturity."

The rule advocated by this article will encourage negotiable paper, and such encouragement is especially needed at the present time. First, the tremendous destruction of capital for military purposes is liable to cause eventual financial stringency and inability to meet many obligations at maturity. No sensible person supposes that he buys a coupon bond at his peril because one or two coupons are overdue. This delay in payment does not necessarily indicate any theft or fraud, but suggests "only causes of a temporary nature." [137] Default of the principal will frequently occur during the next few years for the same reason. Such default makes it impossible for the investor to turn his securities into cash by obtaining payment. It should not also increase the difficulty of doing so by sale. The price will be low enough anyway after dishonor. It ought not to be forced down further by a sudden shift of the risk to the buyers and a consequent loss of market.

Secondly, negotiable paper and incidentally overdue paper ought to be encouraged for public as well as private reasons. It forms the basis of currency issues under the Federal Reserve Act, and should therefore be made as fluid a security as possible whether mature or not. Furthermore, the War, besides increasing the difficulty of meeting obligations, has vastly multiplied the bonds of all nations and has placed them in the hands of a new class of investors who should be given every confidence in these securities. A possible postponement of the payment of principal should not have any serious effect which can be avoided. Overdue coupons are a more immediate problem. Ignorant bondholders will often hold coupons past maturity through forgetfulness. They ought nevertheless to be easily convertible into money, which means that they should be free from hidden defects of title.

Consequently the courts — or better still, the legislatures,[138]

[137] Cromwell *v.* Sac, 96 U. S. 51, 58 (1877).

[138] This result might be secured by an addition to section 57 of the Negotiable Instruments Law, somewhat in the following form: "A holder who has taken the instrument in compliance with the first, third, and fourth conditions of section fifty-two holds the instrument free from any defect of title of prior parties, but not free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties who have no defenses of their own."

should adopt a definite rule, that the honest buyer of overdue paper can hold it against all the world, and enforce it against all parties who have no defenses of their own.

Zechariah Chafee, Jr.

HARVARD LAW SCHOOL
CAMBRIDGE.

APPENDIX: CASES ON CLAIMS TO THE OWNERSHIP OF OVERDUE PAPER

A. *BONÂ FIDE* PURCHASER PROTECTED

A 1. *Cases which Protect the Bonâ Fide Purchaser of Overdue Paper from a Wrongdoer (W) who Obtained Possession Without the Consent of the Owner (O)*

National Bank *v.* Texas, 20 Wall. (U. S.) 72 (1873), — bearer bonds belonging to the state of Texas which the illegal secession government of the state was alleged to have transferred to raise money for use in the Civil War. The majority of the court held that it was not proved that the bonds in suit were among those transferred for this unlawful purpose. Swayne, J., concurring held that the transferee of an overdue instrument is subject only to equities of the obligor, citing Murray *v.* Lylburn.

Sanderson *v.* Crane, 2 Green (14 N. J. L.), 506, 509 (1834), *semble.*

A 2. *Cases which Protect the Bonâ Fide Purchaser of Overdue Paper from a Wrongdoer (W) to whom the Paper was Voluntarily Transferred by its Owner (O) before Maturity*

Y. M. C. A. *v.* Rockford, 179 Ill. 599, 54 N. E. 297 (1899), — order notes indorsed in blank by O; W, pledgee;

Justice *v.* Stonecipher, 267 Ill. 448, 108 N. E. 122 (1915, under N. I. L.), order notes indorsed in blank by O; W, custodian for collection of interest;

Moore *v.* Moore, 112 Ind. 149, 13 N. E. 673 (1887), — order note indorsed by fraud of W without consideration;

Kiefer *v.* Klinsick, 144 Ind. 46, 58, 42 N. E. 447 (1895) *semble* — explaining Moore *v.* Moore;

Etheridge *v.* Gallagher, 55 Miss. 458 (1877), — order note indorsed in blank by O, consideration failed;

Priest *v.* Garnett, 191 S. W. 1048 (Mo. App. 1917), — order note indorsed in blank by O; W, with power to pledge, sold.

A 3. *Cases which Protect the Bonâ Fide Purchaser of Overdue Paper which the Owner (O) Voluntarily Transferred after Maturity*

Young *v.* MacNider, 25 Can. S. C. 272 (1895), — W, administrator and agent of estate allowed by legatees to retain overdue bonds, pledged them;

Wolf *v.* American, 214 Fed. 761 (C. C. A. 7th, 1914), — overdue certificate of deposit specially indorsed by O to W, a pledgee, with power to repledge for limited amount; W repledged for more;

Connell *v.* Bliss, 52 Maine, 476 (1864), — order note indorsed in blank by O; W, attorney for purposes of suit;

Eversole *v.* Maull, 50 Md. 95 (1878), — W, agent for collection;

Gardner *v.* Beacon, 190 Mass. 27, 76 N. E. 455 (1906), — order notes indorsed by O; W, fraudulent;

Church *v.* Clapp, 47 Mich. 257 (1881), — W, mere bailee;

Cochran *v.* Stewart, 21 Minn. 435 (1875); 57 Minn. 499, 59 N. W. 543 (1894), — order notes indorsed in blank by O; W, fraudulent and consideration failed;

Lee *v.* Turner, 89 Mo. 489, 14 S. W. 505 (1886), — order note indorsed; W, agent for collection;

Neuhoff *v.* O'Reilly, 93 Mo. 164, 6 S. W. 78 (1887), — order note indorsed by O in blank without delivery and by W, her administrator, who sold without inventorying it;

Parker *v.* Stallings, Phil. L. (N. C.) 590 (1868), — order note indorsed in blank; W, agent for collection;

Hill *v.* Shields, 81 N. C. 250 (1879), — order note indorsed in blank; W agreed O should not be liable (parol evidence rule as second ground);

Bradford *v.* Williams, 91 N. C. 7 (1884), — order note indorsed in blank; W, agent for collection;

Kempner *v.* Huddleston, 90 Texas, 182, 37 S. W. 1066 (1896), — order note specially indorsed to W for safe keeping.

A 4. *Cases which Protect the Bonâ Fide Purchaser from the Claims of Persons who have Never had Legal Title to the Instrument*

Mohr *v.* Byrne, 135 Cal. 87; 67 Pac. 11 (1901), — order note indorsed by W, the payee, not subject to alleged fractional interest of outsider (probably overruling Chase *v.* Whitmore, 68 Cal. 545, in which *cestui's* equity was held to run; that case also rests on another ground, that the provision for attorney's fees rendered the note nonnegotiable);

Crosby *v.* Tanner, 40 Iowa, 136 (1874), — order note indorsed, not subject to agreement by payee with outsider to cancel note and mortgage securing it so as to make outsider's second mortgage a first lien;

Blake *v.* Koons, 71 Iowa, 356, 32 N. W. 379 (1887), — order note indorsed, not subject to equities of maker's creditors who assert the mortgage secured thereby is in fraud of creditors;

Hibernian *v.* Everman, 52 Miss. 500 (1876), *semble*, — order notes properly indorsed, not affected with partnership rights of partner of payee's son, even if notes were overdue;

Sanderson *v.* Crane, 2 Green (14 N. J. L.), 506 (1834), — order note indorsed by payee who had passed through insolvency but had concealed this note from his assignee not affected with equities;

See also Osgood *v.* Bank, 30 Conn. 27 (1861).

B. *Bonâ Fide* Purchaser Not Protected

B 1. *Cases which do not Protect the Bonâ Fide Purchaser of Overdue Paper from a Wrongdoer (W) who Stole the Paper before Maturity*

Texas *v.* White, 7 Wall. (U. S.) 700 (1868), — "O or bearer" bonds belonging to the state of Texas were sold after secession to raise money for use in war. The title of the state was not divested and it can recover the bonds from a *bonâ fide* purchaser for value. Swayne, Grier, and Miller dissent;

Texas *v.* Hardenberg, 10 Wall. (U. S.) 68 (1869), — same bonds, but the purchase was not in good faith;

Huntington *v.* Texas, 16 Wall. (U. S.) 402 (1872), *semble*, — same bonds;
Vermilye *v.* Adams Express, 21 Wall. (U. S.) 138 (1874), — United States treasury notes payable to bearer, actual notice seems to be held though there was no bad faith, but negligence at most;
Von Hoffman *v.* United States, 18 Ct. Cl. 386 (1883), — bearer bonds; reversed by Morgan *v.* United States, 113 U. S. 476 (1885), solely on ground that the bonds were not overdue;
Gilbrough *v.* Norfolk, 1 Hughes C. C. 410 (1877), — bearer bonds;
Hinckley *v.* National Bank, 131 Mass. 147 (1881), — bearer coupons, *sed quaere* as to voluntary transfer obtained by fraud;
Northampton *v.* Kidder, 106 N. Y. 221, 12 N. E. 577 (1887), — bearer bonds;
Wylie *v.* Speyer, 62 How. Pr. (N. Y.) 107 (1881), — bearer coupons.

B 2. *Cases which do not Protect the Bonâ Fide Purchaser for Value of Overdue Paper from a Wrongdoer (W) who Stole the Paper after Maturity*

Down *v.* Halling, 4 B. & C. 330 (1825), — check; theft or finding have the same effect;
Greenwell *v.* Haydon, 78 Ky. 332 (1880), — order bond, but indorsed in blank by payee and not by O, a later holder;
Davis *v.* Bradley, 26 La. Ann. 555 (1874), — order bill of exchange, indorsed in blank by the payee and not by O, a later holder;
McCorkle *v.* Miller, 64 Mo. App. 153 (1895), *semble*, — order note, indorsed in blank by the payee and not by O, a later holder;
Arents *v.* Commonwealth, 18 Grat. (Va.) 750 (1868), — bearer coupons.

B 3. *Cases which do not Protect the Bonâ Fide Purchaser for Value of Paper which was Lost before Maturity*

Vairin *v.* Hobson, 8 La. 50 (1835), — bearer check, purchase with notice a second ground for decision.

B 4. *Cases which Protect the Bonâ Fide Purchaser of Overdue Paper Voluntarily Transferred but have Dicta Distinguishing Theft, Finding, etc.*

Y. M. C. A. *v.* Rockford, 179 Ill. 599, 604, 54 N. E. 297 (1899), fraud included;
Justice *v.* Stonecipher, 267 Ill. 448, 108 N. E. 722 (1915);
Gardner *v.* Beacon, 190 Mass. 27, 76 N. E. 455 (1906);
Etheridge *v.* Gallagher, 55 Miss. 458, 469 (1877), fraud included.

B 5. *Cases which do not Protect the Bonâ Fide Purchaser of Overdue Paper from a Wrongdoer (W) to whom the Owner (O) Voluntarily Transferred the Paper before Maturity*

Goggerly *v.* Cuthbert, 2 B. & P. N. R. 170 (1806), *semble*, — order bill indorsed by the payee, O, transferred to W for discount who absconded;
Foley *v.* Smith, 6 Wall. (U. S.) 492 (1867), — order note, indorsed in blank by O and O's agent for collection, sold by O's subagent;
Hide *v.* Alexander, 184 Ill. 416 (1900), — order note, but indorsed in blank by party prior to O; W, agent for renewal;
Merchants *v.* Welter, 205 Ill. 647, 56 N. E. 809 (1903), — order note indorsed in blank by maker; W, agent for renewal;
Bird *v.* Cockrem, 28 La. Ann. 70 (1876), — order notes, indorsed in blank prior to acquisition by O; W, a mere custodian;

Ford *v.* Phillips, 83 Mo. 523 (1884), — order note indorsed; W, agent for collection;

Quimby *v.* Stoddard, 67 N. H. 283, 35 Atl. 1106 (1892), — "O or bearer" notes; W, custodian for safe keeping;

Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644 (1885), McIlvaine, C. J., dissenting, — order note, indorsed in blank by O and delivered to W, a firm for temporary use in raising money, sale by member of firm after its dissolution and long after expiration of O's authority; court expressly repudiates any estoppel under the circumstances;

Walker *v.* Wilson, 79 Texas, 185, 14 S. W. 798, 15 S. W. 402 (1890), — bearer note, used contrary to agreement.

B 6. *Cases which do not Protect the Bonâ Fide Purchaser when the Owner (O) Voluntarily Transferred after Maturity*

Lee *v.* Zagury, 8 Taunt. 114 (1817), — order bill indorsed by payee probably in blank and also by O, who took it up after maturity, canceled his indorsement, and sent it for collection to W, who sold it;

In re Sime, 3 Sawy. (U. S.) 305 (Cal. D. C. 1875), *semble*, — order certificates of deposit indorsed by O, sale by W, in breach of agreement;

Clark *v.* Sigourney, 17 Conn. 511 (1846), — order note indorsed in blank by payee who died before delivery, sale by executrix without further indorsement (a very questionable decision, two judges dissenting);

Thomas *v.* Kinsey, 8 Ga. 521 (1850), — "O or bearer note;" W, agent for collection;

Towner *v.* McClelland, 110 Ill. 542 (1884), — order note, indorsed in blank by party prior to O; W, agent for collection (case also rests on point that an assignee of a mortgage who seeks foreclosure is subject to the defense of payment to a prior assignee);

McCormick *v.* Williams, 54 Iowa, 50 (1880), — W, agent for collection;

Wood *v.* McKean, 64 Iowa, 16 (1884), — order note indorsed in blank by O, who pledged to W and left it in W's hands after paying W;

Henderson *v.* Case, 31 La. Ann. 215 (1879), — order bill indorsed in blank; W, agent for collection;

McKim *v.* King, 58 Md. 502 (1882), — bearer coupons; W, depository for refunding;

Emerson *v.* Crocker, 5 N. H. 159 (1830), — order notes indorsed in blank by party prior to O; W, agent for collection;

Farnham *v.* Fox, 62 N. H. 673 (1883), — probably order note; W, authorized to pledge for a certain amount and pledged for more;

Midland *v.* Hitchcock, 37 N. J. Eq. 349 (1883), — bearer bonds; W, bailee for reorganization (judges differ on reasons);

Farrington *v.* Park Bank, 39 Barb. (N. Y.) 645 (1863), — notes transferable by delivery; W, agent to deposit for collection who misappropriated;

Weathered *v.* Smith, 9 Texas, 622 (1853), — "O or bearer" note; W, agent for collection.

B 7. *Cases which do not Protect the Bonâ Fide Purchaser when the Owner (O) Transferred the Paper Voluntarily but it is Uncertain whether the Transfer was before or after Maturity*

Stern Brothers *v.* Germania Bank, 34 La. Ann. 1119 (1882), — bearer coupons; W, agent for collection.

B 8. *Cases which do not Protect the Bonâ Fide Purchaser of Overdue Paper from the Claims of Persons who Never had Legal Title to the Instrument*

Ashurst *v.* Royal Bank of Australia, 27 L. T. 168 (1856), — bearer note transferred to a *bonâ fide* purchaser for value by a bankrupt when overdue is subject to claim of his assignee, (but the same result would follow if it were not overdue because bankruptcy is constructive notice);

In re European Bank, L. R. 5 Ch. App. 358 (1870), — W bought overdue bills with money of O's he had to invest;

West *v.* MacInnes, 23 U. C. Q. B. 357 (1864), — W bought note with money of O's he had to invest;

Young *v.* MacNider, 25 Can. S. C. 272, 277 (1895), *semble*, — estoppel held;

Turner *v.* Hoyle, 95 Mo. 337, 8 S. W. 157 (1888), — order note, indorsed in blank, bought from a trustee when overdue, affected with *cestui's* rights (also there was notice of the trust from the papers);

Mayer *v.* Columbia, 86 Mo. App. 108 (1900), — same result (with no notice from papers);

Owen *v.* Evans, 134 N. Y. 514, 31 N. E. 999 (1892), *semble*, — indorsee after agreeing to sell an overdue note and mortgage to the plaintiff, who paid value, transferred them many years later to the defendant who was not a *bonâ fide* purchaser for value, and was not protected;

Kernohan *v.* Durham, 48 Ohio St. 1, 26 N. E. 982 (1891), — the payee of a note secured by mortgage transferred the mortgage and a forged copy of the note for value to the plaintiff, and afterwards indorsed the true note, now overdue, to the defendant and agreed to assign to him the mortgage; the defendant though a *bonâ fide* purchaser for value of the note is subject to the plaintiff's equity. (The defendant would have priority if he had bought before maturity). Kernohan *v.* Manss, 53 Ohio St. 118, 41 N. E. 258 (1895).

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RESTRAINT OF TRADE: BOARD OF TRADE RULE LIMITING HOURS OF TRADE. — One of the standard forms of trading on the Board of Trade of Chicago is in sales "to arrive," — that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. Trading in grain "to arrive" is carried on each day at special sessions termed the "Call." These sessions are not limited as to duration, but they usually last about half an hour. In 1906 the board adopted a rule by which members were prohibited from purchasing or offering to purchase, in the interval between the close of the "call" and the opening of the session on the next business day, grain "to arrive" at any price other than the closing bid at the "call."

In Board of Trade of Chicago v. *United States* this rule was adjudged to be in violation of the Anti-Trust Act,[1] the lower court striking from the record allegations by the defendants that the purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade which had been acquired by four or five warehousemen. The case was rested by the government upon the proposition that a rule or agreement, by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day, was an illegal restraint of trade under the Anti-Trust Act.

This decree was reversed by the Supreme Court of the United States,[2] the court saying: "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrained competition. Every agreement concerning trade, every regulation of trade, restrains.

[1] 26 STAT. AT L. 209.

[2] 38 Sup. Ct. Rep. 242 (1918).

To bind, to restrain is of the very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Examining the facts, the court concluded that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Act.

The chief questions which the enforcement of the Anti-Trust Act has required the courts to answer are (1) what acts concern and affect "commerce among the several states;" and (2) what acts are "in restraint" of trade or commerce, and what acts "monopolize" trade or commerce.

In *United States* v. *E. C. Knight Co.*[8] the court held that acts, tending to give to one business unit the control of the business of refining sugar, related to manufacture and not to commerce. If facts similar to those which doubtless existed in the Knight Case were today properly pleaded and proved, the decision would probably be that the acts did affect interstate commerce. The Knight Case has ceased to be a safe guide as to the conclusion which the court will probably draw from similar facts. But the question to which the court addressed itself in the Knight Case of course remains as the question logically first to be considered in any proceeding under the Anti-Trust Act. In the principal case the acts in question admittedly concerned and affected interstate commerce.

Therefore the question arises: Was the rule in question "in restraint of trade"? If we split this phrase into four words, and give to each word its dictionary value, we must answer that of course the rule was in restraint of trade. By its operation all the members of the board of trade of the greatest grain market in the world were restrained, about nineteen hours out of every twenty-four, from trading in grain "to arrive" except at a specified price. They were restrained from contracting to buy at any price which they might desire to pay.

This decision may accordingly properly be cited as an authority that the court will not treat the phrase "in restraint of trade" as a phrase to be interpreted simply by taking the dictionary value of each of the four words used. If this standard is rejected, what standard is to be applied?

The phrase "contract in restraint of trade" has been used in the law in the sense of any contract by force of which a person put some restraint upon his activities in trade. Thus, if a person sold a business, including the good-will incident to such business, and contracted not to compete with his vendee for five years, within an area of five miles, this contract might be called a contract "in restraint of trade." In the early common law, this use of the phrase was the common use. But the phrase also came to be used with a sinister connotation, — as the equivalent of "to the detriment of trade." The Anti-Trust Act was passed in 1890, and abundant illustrations of the use of the phrase, with a sinister connotation, can be found prior to 1890 in American constitutions, statutes, and judicial decisions. It would be difficult to say which use of the phrase was the more common in America in 1890.

The Supreme Court of the United States has been called upon to determine in which sense Congress used the phrase. If Congress used

[8] 156 U. S. 1 (1894).

the phrase, taking the words in the early common-law meaning, then the person (engaged in interstate commerce) who sold out his business and agreed not to compete with his vendee was intended by Congress to be treated as a criminal; likewise, of every person (engaged in interstate commerce) who entered into any contract calling for his exclusive services; likewise, of the members of a labor union (engaged in interstate commerce) who agreed between themselves not to work more than a specified number of hours a day. It would be easy to multiply examples which make it seem very unreasonable to suppose that Congress used the phrase in the early common-law meaning.

This is made even plainer if we consider the closely associated question of the interpretation of the word "monopolize." A monopoly, as that word was used in the early common law, meant an exclusive control of some branch of trade through royal grant. In 1890, the only things in the United States analogous to monopolies in this sense were patents and copyrights. Congress did not intend to treat as criminals persons (engaged in interstate commerce) who controlled patented or copyrighted articles. This word was used with a sinister connotation, — to indicate acquiring control of some part of interstate commerce by improper means. As indisputably "monopolizing" is not used in its early common-law meaning, but is used with a sinister connotation, it is reasonable to suppose that Congress may have used the phrase "in restraint of trade" with a sinister connotation, and not in its early common-law meaning.

On this construction of the statute — which, by reason of these considerations, seems to be plainly the proper construction — it becomes the duty of the court to examine the facts of each case, and to determine whether the acts alleged to be "in restraint of trade" are to the detriment of trade. This is precisely the manner in which the court approached the problem in the principal case.

The court, however, used one sentence which may come back to give trouble. "The true test of legality," it said, "is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." The Anti-Trust Act condemns acts which are in restraint of "trade," not acts which are in restraint of "competition." The thought that "competition is the life of trade" has received such wide acceptance that, it is submitted, the court might wisely adopt a secondary rule, for the construction of the Anti-Trust Act, to the effect that acts which limit the freedom of competition (including internal competition) shall be treated as, *prima facie*, acts which are to the detriment of trade. But a cessation of competition *may* conceivably be to the advantage of trade, — may make for more trade rather than less trade, and may produce this beneficial result without the infliction of hardship upon anyone.

PROXIMATE CAUSE. — NEGLIGENT OMISSION OF DUTY AS INTERVENING ACT. — The question of proximate causation is often so complicated with questions of negligence and of "last clear chance" as to be difficult of solution without careful analysis. The general legal principles

governing proximity of causation are neither complex nor difficult. Proximity and remoteness are terms conditioned upon distance in the "propulsion of cause on cause" [1] rather than upon distance in time or space. If between a given cause and a given result no new cause comes in to influence the action of the former cause the result must of course be proximate; that is, a direct result is always proximate.[2] If however a second cause intervenes to combine with the first cause, and thus to change its course and affect the nature of the result, the second cause must in some way be so related to the first, linked up with it, as to make the first cause responsible for the interference of the second cause with the nature of the result. This relation of the two causes may be established by showing that the second cause was actually brought into action by the first; as for instance by inviting the action of the second cause,[3] or by calling it into existence as a defense against the action of the first cause, or against its further consequences.[4] Thus, the publisher of a newspaper is responsible for a purchase by a reader of the paper of goods he advertises, since he advises it;[5] one who unlawfully attacks another is responsible for the effect of an act in self-defense;[6] and one who sets a fire is a proximate cause of injury incurred in the effort to extinguish it.[7] On this ground, too, one who inflicts a physical injury is a proximate cause of an injury inflicted by a surgeon in the effort to cure.[8] Another and more frequent way in which the relation between the two causes may be established is by showing that the first cause created an appreciable risk of concurrence with the second cause. This is usually expressed by the common phrase that the intervention of the second cause must be foreseeable;[9] though there are cases where the foreseeability of the second cause is not of itself enough to make the first cause a proximate cause of the result.[10]

That a failure to perform a legal duty may constitute a cause equally with a positive act is clear;[11] and it may therefore be a second cause coöperating with a positive act or another failure of duty to bring about a result.[12] It seems, however, that a failure to act can never so influence

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[1] BACON'S MAXIMS, Reg. 1.

[2] Lynn Gas & Electric Co. *v.* Meridan Ins. Co., 158 Mass. 570, 33 N. E. 690 (1893); McCahill *v.* New York Transp. Co., 201 N. Y. 221, 94 N. E. 616 (1911); Romney Marsh *v.* Trinity House, L. R. 5 Ex. 204 (1870).

[3] Guille *v.* Swan, 19 Johns. 381 (1822).

[4] Clark *v.* Chambers, 3 Q. B. D. 327 (1878); Eckert *v.* Long Island R. R., 43 N. Y. 502 (1871); Maclenan *v.* Segar, [1917] 2 K. B. 325.

[5] Rex *v.* De Marny, [1907] 1 K. B. 388.

[6] Ricker *v.* Freeman, 50 N. H. 420 (1870); Bloom *v.* Franklin Ins. Co., 97 Ind. 478 (1884); Scott *v.* Shepherd, 2 W. Bl. 892 (1773).

[7] Illinois Central R. R. *v.* Siler, 229 Ill. 390, 82 N. E. 362 (1907).

[8] Com. *v.* Hackett, 2 Allen (Mass.) 136 (1861); Sauter *v.* New York, etc. R.R., 66 N. Y. 50 (1876).

[9] Derry *v.* Flitner, 118 Mass. 131 (1875); Gilman *v.* Noyes, 57 N. H. 627 (1876); Fairbanks *v.* Kerr, 70 Pa. 86 (1871); Harrison *v.* Berkeley, 1 Strobh. (S. C.) L. 525 (1847).

[10] Denny *v.* New York Central R. R., 13 Gray (Mass.) 481 (1859); (but see Green-Wheeler Shoe Co. *v.* Chicago, etc. Ry., 130 Iowa, 123, 106 N. W. 498 (1906)); Graves *v.* Johnson, 179 Mass. 53, 60 N. E. 383 (1901); Admiralty Commrs. *v.* The Amerika, [1917] A. C. 38.

[11] Regina *v.* White, L. R. 1 C. C. 311 (1871); Regina *v.* Instan, [1893] 1 Q. B. 450.

[12] Regina *v.* Lowe, 3 C. & K. 123 (1850); Washington, etc. R. R. *v.* Hickey, 166 U. S. 521 (1897).

the course of events set up by a prior cause as to make the latter remote from the result of it.[13] The one subject to the duty ought to act, and thereby put an end to the force started by the original actor, or so deflect the force as to prevent the injurious result. By failing to act and to intervene in the course of events, he allows the force of the original actor to continue unchecked and undeflected until it directly results in the injury complained of. The failure to act, instead of interfering with the operation of the original force, has wrongly failed to do so.

A recent case in the Supreme Court of the United States, *Union Pacific Railroad Co.* v. *Hadley*, 38 Sup. Ct. 318, brings out this point very neatly. A brakeman, injured by a rear-end collision, had neglected his duty of going back to signal the following train. It was held that the negligence of the company in running the following train was a proximate cause of the injury, and the brakeman was allowed to recover upon the Federal Employer's Liability Act. This decision, in view of the considerations stated above, seems to be thoroughly sound even though, as Mr. Justice Holmes pointed out, the negligence of the brakeman should be deemed "the logical last."

It is to be noticed that in such a case, in spite of the fact that the defendant is a proximate cause of the result, an individual plaintiff who has neglected to act as he should do is usually barred from recovery because of his own contributory negligence or because the consequence in question was avoidable. In the case under discussion the plaintiff would be barred from recovery if the Employers' Liability Act had not abolished the defense of contributory negligence.

THE VIRGINIA–WEST VIRGINIA DEBT CONTROVERSY. — The Supreme Court has left open a point of exceptional interest in holding over for reargument the rule requiring West Virginia to show cause why in default of payment of the judgment in favor of Virginia an order should not be entered directing the levy of a tax by the legislature, and a motion by West Virginia to dismiss the rule.[1] The decision by the chief justice points out that Congress as required by the Constitution ratified the agreement by which West Virginia assumed its proportional share of the debt of Virginia and indicates his opinion that under the doctrine of *McCulloch* v. *Maryland*[2] Congress has the power to enforce its performance. But in the absence of congressional action has the Supreme Court power to mandamus the legislature of West Virginia to levy a tax to pay its obligation? The argument in the affirmative suggested by the court, is that the grant to the judicial power of jurisdiction to determine controversies between two or more states must have been an effectual grant, and that the power to pronounce judgment must include the power to enforce the judgment. But such reasoning though persuasive is not conclusive. Words have no absolute meaning, but

[13] Regina v. Holland, 2 Moo. & R. 351 (1841).

[1] Commonwealth of Virginia v. State of West Virginia, 38 Sup. Ct. 400 (1918).

[2] 4 WHEAT. 316 (1819).

must be interpreted in the Constitution as elsewhere in the light of history and policy. Thus the prohibition of involuntary servitude though absolute in terms, does not prevent compulsory military service.[3] The history of the Fourteenth Amendment is an epic of interpretation from the points of view of both history and the growth of political theory.[4]

That judicial power should as a general proposition include the power to enforce its judgments is obviously necessary to obtain justice from the imperfection of human nature. But jurisdiction has been taken and judgments rendered in a class of cases where the power to enforce them has existed so entirely in theory alone as to raise doubts that it existed at all. In *The Spanish Ambassador* v. *Bingley*[5] it was decided that a foreign sovereign might bring a bill in chancery. *The Colombian Government* v. *Rothschild*[6] held that he must bring it in such a way — by some public officer or otherwise — that justice could be done the defendants in case they chose to bring a cross bill. In *Hullett* v. *King of Spain*[7] the Spanish Government had deposited money in London which it had received from France to hold in trust for Spanish subjects having claims against the French government under a treaty. The money was also on deposit as security for performance by Spain of its obligations. The court interpreted the various treaties and decreed payment to the King of Spain. If we may suppose for a moment the intervention of the *cestuis que trust* and the French government and the necessity of a decree ordering the disposition of the fund according to a view of the treaty which neither France nor Spain could accept, the difficulties of enforcement in anything more than a highly technical sense are clearly discerned.[8] The fact is that the courts go, and must go, in these cases on the theory which one of our own judges has expressed that they cannot presume that a sovereign state will knowingly disobey the judgment of the court and do injustice.[9] And though at first blush this appears the thinnest fiction, it would seem to be on a sound basis. For the function of the courts is to determine the rights of the parties; and though in the common run the coercive power is merely an adjunct to judicial administration, a vast increase in the degree may make a difference in kind and change a question of judicial administration to one of political expediency. It may well become one of those questions, which, in the language of the Duke of York's Case, is "too high" for the court.[10] Such under our own Constitution is the question of the existence of a state government.[11] And it may be argued that the decision whether any state government is or is not republican in form is of the same nature and must be made by Congress and not by the court.[12] So also, it would seem, is

[3] Emma Goldman and Alexander Berkman *v.* United States, 38 Sup. Ct. 166 (1918).

[4] Holmes, J., dissenting, in Lochner *v.* New York, 198 U. S. 45 (1905).

[5] Hob. 113.

[6] 1 Sim. 94.

[7] 2 Bligh (P. C.) (N. S.) 31.

[8] See also and compare Nabob of the Carnatic *v.* East India Co., 1 Vesey, 371, and Nabob of the Carnatic *v.* East India Co., 2 Ves. Jr. 56.

[9] Massachusetts *v.* Rhode Island, 12 Pet. 657, 750 (1838).

[10] Rotuli Parliamentorum, 375; Wambaugh's Cases on Constitutional Law, 1.

[11] Luther *v.* Borden, 7 How. 1 (1849).

[12] Pacific States Tel. & Tel. Co. *v.* Oregon, 223 U. S. 1 (1911).

this question as to what method to pursue to force one of our partially sovereign units to pay a debt due to another. The decision should be made by the representatives of the entire people and then enforced by all the processes which the court has at its command.

Historically the case for the existence of this power in the court is no better.

The pre-Revolutionary period gives us little help. The jurisdiction of the English courts was extremely narrow, the mass of appeals being decided by the administrative committee of the Privy Council in charge of Plantation Affairs.[13] Furthermore, the theory was fundamentally different, being that of a sovereign administering dependencies. The Articles of Confederation, however, provided that Congress should be the "last resort on appeal" in cases of disputes between the states.[14] The method of settlement included a notification of the parties to appear, and a direction by Congress that they should appoint judges "who shall constitute a court for determining the matter." In case of failure to agree an elaborate system was provided for appointing judges "to hear and finally determine the controversy." The judges were to report their decision to Congress, which entered it among its acts as "security for the parties." In essence the scheme was that in case of controversy Congress should by law create a court to decide the case. The court performed the judicial function. Then Congress enacted the decision to give security to the parties. The enforcement was clearly by legislative process, if enforcement was necessary.

In view of this situation what power of enforcement is implied in the provision that judicial power shall extend to controversies between two or more states? [15] Formerly in such cases the judicial function had been performed by a court which admittedly had no power to enforce. And we have seen that coercion even to secure justice may develop into a purely political matter. In *The Cherokee Nation* v. *Georgia*,[16] Chief Justice Marshall said, "that part of the bill which respects the land occupied by the Indians and prays the aid of the court to protect their possession may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with the proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia and restrain its physical force. The propriety of such an interposition by the court may well be questioned. It savours to much of the exercise of political power to be within the province of the judicial department." As bearing on the general belief of the Constitutional Convention as to the coercive power of the judiciary over the states, it is interesting to note that while that department was early given jurisdiction over cases where foreigners were interested in treaties, yet in all drafts up to the final formulation the executive was required to coerce any state which opposed the execu-

[13] The King's Bench had *jurisdiction* only in cases of *quo warranto*, and Chancery only in cases between Lords Proprietary as private subjects. See Massachusetts *v.* Rhode Island, 12 Pet. 657, 739 (1838); SNOW, ADMINISTRATION OF DEPENDENCIES, chap. V.

[14] Article IX.

[15] CONSTITUTION OF UNITED STATES, Article III, § 2.

[16] 5 Pet. 20 (1831).

tion of a treaty.[17] It is also significant that for some time the convention was inclined to reserve disputes between the states in regard to territory and sovereignty — which of all would have seemed the only ones which might need enforcement — for the Senate.[18] And when the broad grant of jurisdiction to the judicial power was finally made we find a contemporary diarist noting that it extended to all controversies of a legal nature between the states.[19] Granting as we do that all disputes between units of a federation are justiciable we may also insist that the coercion of a unit may well be beyond the limitation implied in the words "of a legal nature." Otherwise it would be difficult to explain why so bitter an opponent of Article III as Luther Martin — who also desired that rebellion under state authority should not be treason[20] — took no exception to this grant of power.

It would not seem unreasonable, then, to believe that neither the framers of the Constitution nor subsequent judicial expounders considered that the court had this enforcing power over the states in the absence of a direction by Congress. It is clear both from the history of the case and the language of the opinion that the court finds weighty considerations of policy against claiming it now. Where both historical authority and long judicial practice can consistently join with sound political policy it is well gratefully to declare the union.

SUIT UNDER FOREIGN STATUTE GIVING PERSONAL REPRESENTATIVE THE RIGHT TO RECOVER FOR DEATH BY WRONGFUL ACT. — In considering the subject of statutory right of action for death by wrongful act three questions in the main present themselves: (1) Where may such an action be maintained? (2) In what capacity does the personal representative bring suit? (3) As properly construed, what is the scope of the term "personal representative" as used in these so-called "death statutes"? In general, these questions have not been answered by the courts in a wholly satisfactory manner. It will be profitable to set forth what is conceived to be the correct way of dealing with the subject on principle as illustrated by the more satisfactory decisions, before indicating the effects produced by erroneous theories.

Despite its statutory origin, the right of action for death by wrongful act should be placed in the category of transitory actions on which suit may be maintained in any tribunal having jurisdiction over the person of the defendant. This proposition, sustained by the weight of authority,[1] is of course subject to the qualification that the foreign statute creating the right must be consistent with the policy of the *lex fori*.

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[17] FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, Vol. I, 245, 247; Vol. II, 157.

[18] FARRAND, *supra*, Vol. II, 160, 170, 183, 186.

[19] FARRAND, *supra*, Vol. III, 169.

[20] FARRAND, *supra*, Vol. III, 223.

[1] Dennick *v.* Ry. Co., 103 U. S. 11 (1880); Knight *v.* Ry. Co., 108 Pa. 250 (1885). *Contra*, Wabash Ry. Co. *v.* Fox, 64 Ohio St. 133, 59 N. E. 888 (1901); Richardson *v.* N. Y., etc. Ry. Co., 98 Mass. 85 (1867). See TIFFANY, DEATH BY WRONGFUL ACT (2 ed.), §§ 196, 198.

However, the existence of a "death statute" in the jurisdiction where suit is brought should not be indispensable to indicate a similarity of policy.[2]

The statutes vary in their provisions respecting the party or parties plaintiff in actions thereunder.[3] As the statute of the *locus delicti* creates the right, it should be, and is usually held to be, determinative as to the person or persons who are vested with that right.[4] Where the heirs, widow, husband, parents, guardian, or beneficiaries are designated, no difficulty arises as to the capacity in which they maintain suit, or as to the interpretation of terms. Where, however, the right of action is conferred upon the personal representative, it becomes necessary to determine whether he sues *qua* executor, *qua* administrator, or otherwise, and whether, properly construed, the term "personal representative" includes one appointed by a court other than that of the *locus delicti*. The common statute, of which Lord Campbell's Act is the prototype, creates a wholly new right of action.[5] Damages recovered thereunder are for the benefit of the widow or next of kin and are not assets of the estate of the deceased. Hence the administrator or executor does not sue in his representative capacity but as trustee for the designated beneficiaries.[6] Therefore his ability to maintain suit in any jurisdiction should not be conditional upon his securing ancillary letters of administration.

There seems no justification for placing a narrow interpretation on the term "personal representative." The statutes under consideration are remedial; hence the usual rule of liberal construction should be applied and any representative held authorized to sue irrespective of the jurisdiction in which he was appointed.[7] Confining the meaning of the term to an appointee of the *locus delicti* is not defensible on principle. Normally the domiciliary representative is the first to be appointed. Hence the right of action should accrue to him, and suit thereon be maintainable by him alone.[8]

It is submitted, therefore, that the right of a personal representative to recover under a "death statute" should not be conditioned upon his laying the venue in the jurisdiction where the death occurred, nor upon

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[2] As "death statutes" have been almost universally enacted, the discussion of policy usually turns on the extent of similarity between the local and foreign enactments. The existence of some such statute in the *locus fori* was held requisite in Leonard *v.* Columbia, etc. Co., 84 N. Y. 48 (1881). For an analogous situation, in which the contrary opinion prevailed, see Herrick *v.* Minneapolis, etc. Ry. Co., 31 Minn. 11, 16 N. W. 413 (1883), quoted from and approved in Northern Pac. Co. *v.* Babcock, 154 U. S. 190 (1893).

[3] See TIFFANY, DEATH BY WRONGFUL ACT (2 ed.), xix–lxxi.

[4] Usher *v.* West Jersey Ry. Co., 126 Pa. 206, 17 Atl. 597 (1889); Wooden *v.* Ry. Co., 126 N. Y. 10, 26 N. E. 1050 (1891). *Contra*, Stewart *v.* Baltimore, etc. Ry. Co., 168 U. S. 445 (1897).

[5] Leggott *v.* Great Northern Ry. Co., 1 Q. B. D. 599 (1876); Whitford *v.* Panama Ry. Co., 23 N. Y. 465 (1861); Quinn *v.* Chicago, etc. Ry. Co., 141 Wis. 497, 124 N. W. 653 (1910).

[6] Connor *v.* N. Y., etc. Ry. Co., 28 R. I. 560, 68 Atl. 481 (1908); Boulden *v.* Pa. Ry. Co., 205 Pa. 264, 54 Atl. 906 (1903); Kansas, etc. Ry. Co. *v.* Cutter, 16 Kan. 568 (1876).

[7] Dennick *v.* Ry. Co., *supra*, note 1.

[8] There is a *dictum* to this effect in McCarty *v.* N. Y., etc. Ry. Co., 62 Fed. 437, 438 (1894).

his acquiring ancillary letters of administration in the *locus fori*, nor upon his being appointed by the court of the *locus delicti*, but simply upon the court's having jurisdiction over the person of the defendant as required by due process.

Let us turn now to the erroneous theories and the effects produced thereby. In some jurisdictions it is held that the statutes under consideration do not create a new cause of action, but merely permit a survival to the personal representative of a right which had accrued to his decedent.[9] He must therefore bring suit in his representative capacity and is subject to the rule requiring him to take out ancillary letters in case the venue is not laid in the jurisdiction of the domicile.[10] A further limitation is placed upon the statutory right of action by a singularly narrow interpretation of the term "personal representative." The recent case of *Battese* v. *Union Pacific Ry. Co.*[11] denies that a domiciliary administrator is within this term for purposes of suit under a foreign statute, apparently confining the right of action to an appointee of the *locus delicti*.[12] A combination of these two theories produces the following undesirable results: (1) Assuming that the defendant can be served with process neither at the domicile of the decedent nor in the jurisdiction where the death occurred, ancillary letters of administration must be secured from both the *locus delicti* and the *locus fori*. (2) As the right of action is not for the benefit of the estate, the grant of letters of administration may be denied in a jurisdiction where the decedent left no assets.[13] (3) Where conflicting interpretations are placed on the term "personal representative," *quaere* as to the person in whom is vested the right of action. The construction of a statute of any jurisdiction is for its own courts.[14] However, in the usual case involving the present considerations, a court is called on to construe a foreign statute which has not been interpreted by the court of the jurisdiction of its enactment. The most that can be derived from such a construction is an implied assent that the local statute be similarly construed by foreign tribunals.[15]

RECENT CASES

CHOSES IN ACTION — RIGHTS AND LIABILITIES OF ASSIGNEE — CONTRACT RUNNING WITH A BUSINESS. — A telegraph company agreed to construct and maintain a telegraph line along the right of way of a railroad, as part of the railroad system. The railroad company became bankrupt, and the property

[9] Bellamy v. Whitsell, 123 Mo. App. 610, 100 S. W. 514 (1907); St. Louis, etc. Ry. Co. v. McNamare, 91 Ark. 515, 122 S. W. 102 (1909); Louisville Ry. Co. v. Raymond's Adm'r, 135 Ky. 738, 123 S. W. 281 (1909).

[10] Brooks v. Southern Pac. Ry. Co., 148 Fed. 986 (1906).

[11] 170 Pac. 811 (Kan.) (1918). See Recent Cases, page 1164.

[12] Hall v. Southern Ry. Co., 146 N. C. 345, 59 S. E. 879 (1907); Louisville, etc. Ry. Co. v. Brantley's Adm'r, 96 Ky. 297, 28 S. W. 477 (1894).

[13] Perry v. St. Joseph Ry. Co., 29 Kan. 420 (1883); Jeffersonville Ry. Co. v. Swayne's Adm'r, 26 Ind. 477 (1866). *Contra*, Hutchins v. St. Paul, etc. Ry. Co., 44 Minn. 5, 46 N. W. 79 (1890); Findlay v. Chicago, etc. Ry. Co., 106 Mich. 700, 64 N. W. 732 (1895). See 1 WOERNER, AMERICAN LAW OF ADMINISTRATION (2 ed.), § 205.

[14] See 2 SUTHERLAND STATUTORY CONSTRUCTION (2 ed.), § 319.

[15] See 23 HARV. L. REV. 554.

was sold on foreclosure to the plaintiff and all contracts assigned to him. Upon notice that the telegraph company considered the contract at an end, the plaintiff filed a bill to compel performance. *Held*, that the defendant was still bound by the contract. *Detroit, etc. R. Co.* v. *Western Union Tel. Co.*, 166 N. W. 494 (Mich.).

It is fundamental that an assignor cannot, by assigning a contract, relieve himself from liability thereunder. *Ferguson* v. *McBean*, 91 Cal. 63, 27 Pac. 518; *Springer* v. *De Wolf*, 194 Ill. 218, 62 N. E. 542. Indeed, unless the parties make a novation, or, in jurisdictions allowing a beneficiary to recover, the assignee expressly agrees to perform for the benefit of the original promisee, the latter's only relief is against the assignor. *Lisenby* v. *Newton*, 120 Cal. 571, 52 Pac. 813. See 2 ELLIOTT, CONTRACTS, § 1456. If, then, the assignor becomes insolvent or goes out of existence, the promisee's security for the performance of the promisor is so jeopardized or destroyed that he should be warranted in repudiating the contract. *Central Trust Co.* v. *Chicago Auditorium Co.*, 240 U. S. 581. Hence, although the assignee in the principal case assumed liability under the contract it would follow, on ordinary contract principles, that the defendant cannot be forced to perform, for a novation cannot be thrust upon him against his consent. Courts of equity have, however, regarded contracts made for the benefit of a business as passing with the business to the purchaser thereof and enforceable by him, even without express assignment, just as a contract for the benefit of land runs in equity with the land. *Abergavw Brewing Co.* v. *Holmes*, [1900] 1 Ch. 188. Mutuality of performance can be secured by a conditional decree. *Courage & Co.* v. *Carpenter*, [1910] 1 Ch. 262. The difficulty that equity is enforcing continuous performance is offset by the consideration of the great hardship which would otherwise result to the plaintiff, and the public interest in carrying out the contract. *Dominion Iron & Steel Co.* v. *Dominion Coal Co.*, 43 Nova Scotia, 77; *Union Pac. R. Co.* v. *Chicago, etc. R. Co.*, 163 U. S. 564.

CONFLICT OF LAWS — OBLIGATIONS *EX DELICTO*: CREATION AND ENFORCEMENT — STATUTE GIVING PERSONAL REPRESENTATIVE RIGHT TO SUE FOR DEATH BY WRONGFUL ACT. — Plaintiff's intestate was killed by defendant's negligence in Nebraska, where a statute gives the personal representative a right of action for death by wrongful act. Plaintiff, appointed administrator by the Kansas court, sues in Kansas to recover under the Nebraska statute. *Held*, that the action cannot be maintained, as "personal representative" refers to one appointed by the state whose statute created the right of action. *Battese* v. *Union Pacific Ry. Co.*, 170 Pac. 811 (Kan.).

For a discussion of this case see Notes, page 116.

CONSTITUTIONAL LAW — CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONS — STATE JURISDICTION OVER FEDERAL LANDS. — The defendant was convicted in an Idaho court for violation of a statute of Idaho prohibiting the grazing of sheep under certain circumstances. The offense was committed on United States government lands in the state in which grazing was permitted by the federal authorities. *Held*, that the conviction should be affirmed: *Omaechevarria* v. *Idaho*, 38 Sup. Ct. Rep. 323.

Where the federal government succeeds to the title of land within a state with the consent of the state legislature the federal jurisdiction over the land is exclusive of all state authority. U. S. CONSTITUTION, Art. I, § 8, clause 17; *Commonwealth* v. *Clary*, 8 Mass. 72. Even here it has been held that state courts have jurisdiction of a local action between private parties with respect to land ceded to the United States until Congress has made new regulations touching the administration of civil cases arising therein. *Barrett* v. *Palmer*, 135 N. Y. 336, 31 N. E. 1017. But over land acquired by the federal govern-

ment by purchase or eminent domain without the consent of the state legislature the state jurisdiction remains "complete and perfect," subject to the limitation that it cannot be exercised antagonistically to federal governmental interests. *People* v. *Godfrey*, 17 Johns. (N. Y.) 225. The same is true of land belonging to the federal government at the date of admission of the state in which the land lies and over which Congress has not reserved exclusive jurisdiction. *United States* v. *Stahl*, 1 Woolw. (U. S. Cir. Ct.) 192. See also 14 OPINIONS, ATTORNEYS GENERAL, 33. The instant case falls within this last rule.

CONSTITUTIONAL LAW — CONTROVERSIES BETWEEN TWO OR MORE STATES — POWER TO MANDAMUS STATE LEGISLATURE. — Argument of the rule to show cause why, in the default of payment of the judgment against West Virginia in favor of Virginia, an order should not be entered directing the levy of a tax by the legislature of West Virginia, and the motion by that state to dismiss the rule. *Held*, the case should be restored to the docket for further argument, such argument to embrace (1) the right to award the mandamus prayed for; (2) if not, the power and duty to direct the levy of a tax; (3) if means for doing so be found to exist, the right, if necessary, to apply such other and appropriate remedy by dealing with the funds or taxable property of West Virginia or the rights of that state as may secure an execution of the judgment. *Commonwealth of Virginia* v. *State of West Virginia*, 38 Sup. Ct. 400.

For a discussion of this case, see Notes, page 1158.

CONSTITUTIONAL LAW — DUE PROCESS — MINIMUM WAGE FOR WOMEN AND MINORS. — The legislative of Minnesota in 1913 passed an act establishing a minimum-wage commission and prohibiting every employer from employing any woman or minor at less than the living wage as determined by order of the commission. Plaintiffs sought to restrain the enforcement of orders of the commission on the ground that the statute was unconstitutional. *Held*, that the act is constitutional. *Williams* v. *Evans*, 165 N. W. 495 (Minn.).

For a discussion of this case and other cases involving recent labor legislation, see Notes, page 1013.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE — DELEGATION OF LEGISLATIVE POWER TO BOARD OF HEALTH. — A Massachusetts statute empowered the State board of health to "make rules and regulations to prevent the pollution . . . of all such waters as are used as sources of water supply." (MASS. R. L., c. 75, § 113, as amended by St. 1907, c. 467, § 1.) In pursuance of this authority the board passed a regulation forbidding anyone to fish in a certain lake without a permit. *Held*, that this does not constitute an unconstitutional delegation of legislative power. *Commonwealth* v. *Hyde*, 118 N. E. 643 (Mass.).

The general proposition that legislative power cannot be delegated is a familiar maxim in American jurisprudence. *Wayman* v. *Southard*, 10 Wheat. (U. S.) 1. See 19 HARV. L. REV. 203. The basis for the doctrine rests primarily in the express grant in federal and state constitutions of the legislative power to a designated branch of the government. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210; *Winchester, etc. R. Co.* v. *Commonwealth*, 106 Va. 264, 55 S. E. 692. See *Dreyer* v. *Illinois*, 187 U. S. 71, 83. In the nature of things, however, no precise demarcation is possible between legislative enactment and mere administrative regulation. See *Chicago, etc. Ry. Co.* v. *Dey*, 35 Fed. 866, 874. The result is a great confusion among the cases as to what powers may be granted to administrative boards. *Cf. United States* v. *Louisville, etc. R. Co.*, 176 Fed. 942; *Pierce* v. *Doolittle*, 130 Ia. 333, 106 N. W. 751; *State* v. *Carlisle*, 235 Mo. 252, 138 S. W. 513; *State* v. *Southern R. Co.*,

141 N. C. 846, 54 S. E. 294. A well-established exception to the general rule, based mainly on historical grounds, exists in the case of delegation of legislative power to municipal corporations. *Commonwealth* v. *Bennett*, 108 Mass. 27; *Noonan* v. *City of Hudson*, 52 N. J. L. 398, 20 Atl. 255; *Gloversville* v. *Howell*, 70 N. Y. 287. And this exception has been extended by analogy to local boards of health. See *Brodbine* v. *Revere*, 182 Mass. 598, 601, 66 N. E. 607, 608. But powers quite as broad and similarly legislative in character have been granted to state boards of health. *Blue* v. *Beach*, 155 Ind. 121, 56 N. E. 89. The reason then advanced for the large delegation of power is the necessity of leaving to such bodies a wide discretion in the adoption of measures for the preservation of the public health. See *Brodbine* v. *Revere*, *supra*. Then, by analogy with the broad powers given to boards of health, powers which once would have been denominated clearly legislative in character have been delegated to administrative tribunals of all sorts. See *Commonwealth* v. *Sisson*, 189 Mass. 247, 252, 79 N. E. 619, 621. *Cf. Munn* v. *Illinois*, 94 U. S. 113, 133; *Railroad Commission* v. *Central R. Co.*, 170 Fed. 225. The explanation of this development is found primarily in the growing realization that administrative boards are better fitted to deal with these problems, both legislatively and administratively, than are legislatures. The original prohibition against the delegation of legislative power has thus been whittled down until today, in many jurisdictions, so long as the legislative body prescribes the general policy and the purpose to be attained, the means of effectuating this policy may be left entirely to an administrative commission. See *Blue* v. *Beach*, 155 Ind. 121, 132, 56 N. E. 89, 93.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — CONTRACT NOT TO SUE BUT TO SUBMIT TO TRIBUNAL OF BENEFIT SOCIETY. — The constitution of a mutual benefit association provided that certain claims for disability "shall be addressed to the systematic benevolence of the brotherhood, and shall in no case be made the basis of any legal liability." The plaintiff was disabled, and having been refused payment on his certificate by the beneficiary board of the brotherhood, sued to enforce his claim. *Held*, that he could recover. *Miller* v. *Brotherhood of Local Trainmen*, 118 N. E. 713 (Ill.).

This sort of provision has given rise to two lines of decisions. Cases in accord with the principal case have held the provision void on the ground that the parties should not be allowed, by contract, to preclude themselves from invoking the aid of the court. *Pepin* v. *Societe St. Jean Baptiste*, 23 R. I. 81, 49 Atl. 387; *Austin* v. *Searing*, 16 N. Y. 112; *Wood* v. *Humphreys*, 114 Mass. 185. On the other hand, the provision has been held valid because it was voluntarily agreed to by the insured who by this agreement waived nothing he did not have the right and power to waive. *Osceola Tribe* v. *Schmidt*, 57 Md. 98; *Van Poucke* v. *Netherland, etc. Society*, 63 Mich. 378, 29 N. W. 863. The reasonable rule would seem to be that the association may provide methods for determining the facts speedily and definitely, and compel its members to resort to a prescribed mode of procedure before invoking the aid of the courts, but that it cannot entirely prohibit suit so that recovery by the insured will depend upon the caprice of the association.

INNKEEPERS — DUTIES TO TRAVELERS AND GUESTS — LIABILITY TO BOARDER FOR GOODS STOLEN. — The defendant operated a hotel and gave to the plaintiff a lease of a suite for a term of six months. Certain tennis trophies were stolen from the plaintiff's rooms. *Held*, that the extraordinary liability of an innkeeper did not attach to this relation. *Hackett* v. *Bell Operating Co.*, 169 N. Y. Supp. 114.

It has long been well settled that the innkeeper is liable to the guest for baggage stolen, without regard to negligence. *Carr's Case*, 1 Roll. Abr. 3;

Calye's Case, 8 Coke Rep. 32 *a*; *Hall* v. *Pike*, 100 Mass. 495. See BEALE, INNKEEPERS, §§ 183–85, 188. It is equally axiomatic that the lodging-house keeper is liable only for reasonable care. *Holder* v. *Soulby*, 8 C. B. (N. S.) 254. See *Scarborough* v. *Cosgrove*, [1905] 2 K. B. 805. See also 19 HARV. L. REV. 534. The public duty and extraordinary liability of the innkeeper exist only in regard to a traveler. *Rex* v. *Luellin*, 12 Mod. 445. See Bruce Wyman, "The Inherent Limitation of the Public Service Duty to Particular Classes," 23 HARV. L. REV. 339, 340. Where an innkeeper entertains boarders as well as guests, he is nevertheless liable to the boarder only as a lodging-house keeper and not as an innkeeper. *Lamond* v. *Richard*, [1897] 1 Q. B. 541; *Manning* v. *Wells*, 9 Humph. (Tenn.) 746; *Horner* v. *Harvey*, 3 N. M. 197, 5 Pac. 329; *Crapo* v. *Rockwell*. 48 Misc. 1, 94 N. Y. Supp. 1122. See BEALE, INNKEEPERS, §§ 201, 202; 2 PARSONS, CONTRACTS, 8 ed., 159. See also 10 HARV. L. REV. 519. In many cases it is a difficult question of fact to determine whether the person entertained is a guest or a boarder. The courts seem to assume that he is a guest, unless the contrary is clearly shown. *Cf. Hancock* v. *Rand*, 94 N. Y. 1, and *Shoecraft* v. *Bailey*, 25 Iowa, 553. But *cf. Meacham* v. *Galloway*, 102 Tenn. 415. In the principal case, the lease negatives the possibility of the innkeeper relation.

INTERNATIONAL LAW — CHANGE OF SOVEREIGNTY — EFFECT OF RECOGNITION OF FOREIGN GOVERNMENT. — During the revolution of General Carranza against Huerta, officers of the former, in pursuance of military orders, seized property and sold it to a United States citizen. Subsequent to the seizure, the United States government recognized Carranza's government as the *de jure* government of Mexico. This suit was brought to determine whether the purchasers from Carranza's officers acquired good title as against someone claiming under the former owner. *Held*, that good title was acquired. *Ricaud* v. *American Metal Co.*, 38 Sup. Ct. Rep. 312.

The acts of one sovereign state done within its own territory are not subject to review by the courts of another. *Underhill* v. *Hernandez*, 168 U. S. 250; *American Banana Co.* v. *United States Fruit Co.*, 237 U. S. 347. This principle has even been extended to acts done by a *de facto* as well as a *de jure* government. *O'Neill* v. *Central Leather Co.*, 87 N. J. L. 552, 94 Atl. 789. It belongs exclusively to the political department of the government to recognize who the sovereign of a territory is, and this recognition is absolutely binding on the courts of that government. *Jones* v. *United States*, 137 U. S. 202; *O'Neill* v. *Central Leather Co.*, *supra; State of Yucatan* v. *Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219; *United States* v. *Palmer*, 3 Wheat. (U. S.) 610; *Williams* v. *Suffolk Ins. Co.*, 13 Peters (U. S.), 415. The recognition by this government of a foreign sovereign relates back to the inception of the latter government, and makes binding in this country its acts from the beginning. *Underhill* v. *Hernandez*, *supra; State of Yucatan* v. *Argumedo*, *supra*. See *Williams* v. *Bruffy*, 96 U. S. 178, 186.

JUDGES — DISQUALIFICATION — PARTICIPATION OF DISQUALIFIED JUDGE. — In the hearing of an action to construe a statute fixing the salaries of members of the supreme court, four of the five justices withdrew in favor of four district judges. One justice participated in the determination of the cause. His presence was not necessary to constitute a quorum, nor did his vote decide the result. The state constitution provides that if a judge of the supreme court is in any way interested in a case before the court, the remaining justices shall call one of the district judges to sit with them in the hearing of that cause. (N. D. CONST. § 100.) *Held*, that the mere presence of the disqualified judge did not render the judgment void. *State ex rel. Langer* v. *Kositzky*, 166 N. W. 534 (N. D.).

At common law a judge was disqualified if he was a party to the cause or interested in it financially, but his judgment was merely voidable. Generally the disqualification might be waived by the parties. *Dimes* v. *Grand Junction Canal*, 3 H. L. 759. Where statutes expressly forbid persons performing judicial functions from acting when they are interested, such interest, if subsequently shown, is usually held to render the judgment void. *Moses* v. *Julian*, 45 N. H. 52; *Oakley* v. *Aspinwall*, 3 N. Y. 547. But see *Hine* v. *Hussey*, 45 Ala. 496. See FREEMAN, JUDGMENTS, 4 ed., § 146 *et seq.* See also 20 HARV. L. REV. 152; 30 *Id.* 103. A disqualified judge may make a purely formal order. See *Estate of White*, 37 Cal. 190, 192. Judgments of a *de facto* judge, unlike those of a disqualified judge, stand against collateral attack. *State* v. *Alling*, 12 Ohio St. 16. Where the vote of the disqualified judge does not decide the result, there is no settled authority as to the effect of his participation. The situation is analogous to the case of the director with whom the board, of which he is a member, contracts on behalf of the corporation. If the interested director takes no part in the proceedings, the weight of American authority is that the contract is not void. *Fort Payne Rolling Mill* v. *Hill*, 174 Mass. 224, 54 N. E. 532. But see *Stewart* v. *Lehigh Valley Co.*, 38 N. J. L. 505. Both as to judges and directors, the earlier cases were disinclined to consider degrees of influence. See *Hesketh* v. *Braddock*, 3 Burr. 1847, 1856. When the disqualified judge is not necessary to the decision, there is no reason for pushing the rule against participation to extremes, and the present decision may be supported notwithstanding the seeming impropriety of the judge's conduct. But see *Seaward* v. *Tasker*, 143 N. Y. Supp. 257. *Cf. Matter of Ryers*, 72 N. Y. 1; *State* v. *Polley*, 34 S. D. 565, 138 N. W. 300.

PROXIMATE CAUSE — EFFICIENT CAUSE OF INJURY — CAUSAL CONNECTION NOT BROKEN BY FAILURE TO ACT. — A brakeman on a freight train negligently failed to signal another train which, because of the railroad company's negligence, was following dangerously close. A rear-end collision occurred, in which the brakeman was killed. His administrator sued under the Federal Employers' Liability Act. *Held*, that he could recover. *Union Pacific Railroad Co.* v. *Hadley*, 38 Sup. Ct. 318.

For a discussion of this case, see Notes, page 1158.

PUBLIC SERVICE COMPANIES — REGULATION OF PUBLIC SERVICE COMPANIES — POWER OF STATE TO ALTER RATES FIXED BY MUNICIPAL FRANCHISE. — An ordinance granting a sewer company permission to operate within municipal limits imposed a condition that rates for service to property owners should not exceed a maximum fixed therein. The state subsequently created a public utilities commission with power to fix rates. The sewerage company petitioned the commission for authority to charge rates higher than the maximum fixed in the ordinance. *Held*, that the commission had jurisdiction to grant the authority sought. *Collingswood Sewerage Co.* v. *Borough of Collingswood*, 102 Atl. 901 (N. J.).

The rather common provision that a public service company must secure the consent of the municipality in which it proposes to operate, and that, in granting such permission, the municipality may or shall impose conditions, results in a peculiar agreement between the public service company and the municipality or its residents and property owners. Until and unless the state acts this agreement is binding on both parties. See 31 HARV. L. REV. 879. But it is clear that the state may, without encountering the contract clause of the federal constitution, legislate such agreements out of existence, or modify them in any way. The state may authorize the public service company to charge rates in excess of the maximum provided by the agreement. *City of Worcester* v. *Worcester, etc. Ry. Co.*, 196 U. S. 539; *Board of Survey of Arlington* v.

Bay State St. Ry. Co., 224 Mass. 463, 113 N. E. 273. And the state may reduce rates below those fixed in the agreement. *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624. The reason lies in the strong policy in favor of governmental regulation of services vital to the public good. *Munn* v. *Illinois*, 94 U. S. 113. The agreement between the municipality and public service company is usually called a contract. But the features just noted show that we have here a kind of agreement that does not come within the usual conception of a contract. Either there is some lack of capacity of parties to contract with reference to the subject matter, or there is something peculiar in the agreement itself. Whatever the defect may be, it is submitted that the court was correct in the principal case in saying, "The truth in an ordinance of this kind is a grant upon condition, rather than a contract." The grant is of all right which the municipality can give, and the condition is that it shall be subject to state regulation or alteration. This description better suits the nature of the agreement, and it avoids the confusion that arises from the idea of a contract not protected against state legislation by the contract clause of the federal constitution.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — RULE OF BOARD OF TRADE FIXING GRAIN PRICES. — The Chicago Board of Trade adopted a rule prohibiting its members from dealing in grain "to arrive," during the interval between the close of the daily "call" session and the opening of the next day's "call," at any other price than the closing bid at the "call." *Held*, not a violation of the Sherman Anti-Trust Law. *Board of Trade of Chicago* v. *United States*, 38 Sup. Ct. 242.

For a discussion of this case, see Notes, page 1154.

SEAMEN — SEAMEN'S ACT OF 1915 — REQUIREMENT OF GOOD FAITH. — The Seamen's Act (38 STAT. AT. L. 1165), provides that "every seaman of a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs a one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void. Any failure on the part of the master to comply with this demand shall release the seaman from his contract, and he shall be entitled to full payment of wages earned. . . . This section shall apply to seaman of foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seaman for its enforcement." Libellants demanded half their wages pursuant to this section. This demand was part of a concerted purpose to leave the ship because of the submarine danger. The demand was refused. The libellants left the ship. *Held*, they cannot recover for wages. *The Belgier*, 246 Fed. 966.

A quitting of the ship *non animo revertendi* has always been a reprehensible offense at the maritime law. It was justified by cruelty, deviation, or a failure to supply provisions, and by practically no other grounds. *Sherwood* v. *McIntosh*, Ware (U. S. Dist. Ct.), 109; *The Eliza*, 1 Hagg. Adm. 182; *The Castilia*, 1 Hagg. Adm. 59; *Brower* v. *The Maiden*, Gilp. (U. S. Dist. Ct.) 294. See 3 KENT, COMMENTARIES, 11 ed., 270–72. See also 11 HARV. L. REV. 411. A desertion forfeited the wages due the seaman. *The Bark Merrimac*, 1 Ben. (U. S. Dist. Ct.) 490; *Coffin* v. *Jenkins*, 3 Story (U. S. Cir. Ct.) 108. The Seaman's Act abolished arrest and imprisonment as a penalty for desertion. The avowed purpose of the act was to encourage the desertion of seamen from foreign vessels in the harbors of the United States and thereby to remove the economic handicap which higher wages have placed on American shipping. The act was a piece of "international bad manners," and the result reached by the court is no doubt salutary, but *quaere* whether it was justified in overriding the legislative intent by reading "good faith" into the statute.

TRUSTS — CREATION AND VALIDITY — DISCLAIMER BY ONE OF SEVERAL *CESTUIS*. — The plaintiff transferred property in trust to be divided at his death among his three children. One of them was to receive a certain sum, on condition that he immediately pay over $500 thereof to a stranger. This *cestui* refused to accept or be bound by the gift. The plaintiff sued to recover back all the property on the ground that this disclaimer was a breach of condition precedent to the creation of the trust. *Held*, that he could recover. *Sloan* v. *Sloan*, 118 N. E. 709 (Ill.).

When property is transferred in trust for another, the great weight of authority is that the beneficial interest immediately vests in the *cestui* subject to his disclaimer. *Middleton* v. *Pollock*, 2 Ch. D. 104; *Minor* v. *Rogers*, 40 Conn. 512; *Martin* v. *Funk*, 75 N. Y. 134; *O'Brien* v. *Bank of Douglas*, 17 Ariz. 203, 149 Pac. 747. Once created, the only method of terminating a trust where the settlor has not expressly provided therefor is by a renunciation on the part of all the beneficiaries. *Minot* v. *Tilton*, 64 N. H. 371; *Hellman* v. *McWilliams*, 70 Cal. 449, 11 Pac. 659. Disclaimer by one *cestui* does not affect the interests of the others. *Cf. Willis* v. *Thompson*, 85 Texas, 301, 20 S. W. 155. Furthermore, courts have gone a long way in construing express words of condition as creating a trust to be enforced, not by forfeiture, but by the usual methods of compelling performance of a trust. *Koch* v. *Streuter*, 232 Ill. 594, 83 N. E. 1072; *Mills* v. *Grace Church*, 54 N. J. Eq. 659; *Stanley* v. *Colt*, 5 Wall. (U. S.) 119. Under such a construction the *cestui* in the principal case would receive his share of the property in trust to pay part thereof to another. Hence disclaimer by him would be *pro tanto* disclaimer as trustee and not as *cestui*. The court could appoint a new trustee for this amount and the third party's interest would not be affected. *Adams* v. *Adams*, 21 Wall. (U. S.) 185. Although the trust failed as to the remainder of this *cestui's* share in the property, it is difficult to see why the other *cestuis* should not take. If the carrying out of the condition by the former was such an essential part of the trust scheme that failure to comply with its terms would defeat the whole purpose of the trust, the decision could be understood. It would be analogous to cases where the trust can only be carried out by one particular trustee. *Security Co.* v. *Snow*, 70 Conn. 288. The facts of the principal case, however, do not justify such an interpretation.

WILLS — INCORPORATION BY REFERENCE — REFERENCE TO AN EXISTING DOCUMENT AS EXISTING. — A testator directed that trust funds be paid as his wife's last will should direct, and that if it should be impossible to tell whether he predeceased her, his will should be construed on the basis that he had predeceased her. At the same time the wife made a will reciting the power and disposing of the property. Both died in the same accident, so that it was not known which predeceased the other. *Held*, that the property passed according to the wife's will. *In re Fowles' Will*, 118 N. E. 611 (N. Y.).

The case must be taken as a step in the adoption of the predominating doctrine of incorporation by reference. As such it is a departure from the orthodox New York view that incorporation will not be permitted. *In re Emmons' Will*, 110 App. Div. 701, 96 N. Y. Supp. 506; *Booth* v. *Baptist Church*, 126 N. Y. 215, 28 N. E. 238. But in at least one other case the decision seems explicable only on the ground that the court allowed an unexecuted document to be incorporated into the testator's will by reference. *Matter of Piffard*, 111 N. Y. 410, 18 N. E. 718. See also *Condit* v. *De Hart*, 62 N. J. L. 78, 40 Atl. 776. In each of these cases the donee of the power to appoint by his will predeceased the testator giving the power. The will of the testator did not refer specifically to the will of the donee as then existing although the republication of the will of the former by a codicil executed after the death of the latter caused the will to refer to an existing document. The cases are as indefensible as the

instant case, under the strict doctrine of incorporation requiring the reference to be to an existing document as being in existence. *Allen* v. *Maddock*, 11 Moo. P. C. 427; *Magnus* v. *Magnus*, 80 N. J. Eq. 346, 84 Atl. 705; *Hunt* v. *Evans*, 134 Ill. 496, 25 N. E. 579.

BOOK REVIEWS

STUDIES IN THE PROBLEM OF SOVEREIGNTY. By Harold J. Laski. New Haven: Yale University Press. London: Humphrey Milford. Oxford University Press. 1917. pp. (10)+ 297.

The nature of the state and its attributes have been subjects of fascinating interest at least since the time when Aristotle developed in bold outline that science of politics which perhaps it is not too much to say has dominated the thinking of men to this day. A conception of sovereignty appears clearly enough in Aristotle's discussion of the state; but the term itself seems to have been first used by Bodin in his treatise, *De la Republique* (1576). To Blackstone sovereignty was "the supreme authority in which the *jura summi imperii* reside," a definition which has been quoted approvingly by more than one American supreme court. To most of the better known writers it is absolute, supreme, indivisible. This is the quality which prevailing political theory has attributed to the state, a quality, moreover, which even some modern states have not been slow to assert, and not altogether unsuccessfully to employ.

To this claim, this attempted exertion of unlimited authority, Mr. Laski and certain other modern political writers oppose a bold challenge and denial. What, they ask, are the facts? Has the state succeeded *always* in exerting absolute power when it has sought to do so? For a single failure would seem to be fatal to this claim of absolutism.

Very little real thinking about the nature of the state has been done in America. Despite our democratic institutions and ideas, and ignoring our division of the powers of "indivisible" sovereignty and all the numerous "checks and balances" upon governmental functioning which have given a new meaning to constitutional law, we have tended rather docilely to accept, perhaps, through the medium of Blackstone's wholly mechanistic and fictional treatment, a theory of the absolute state, totally at variance with the spirit of our history or with any actuality which we propose to submit to. Doubtless, too, Rousseau's *Contrat Social* did much to shape and color the views of our early publicists in this as in all their political thinking. The more carefully formulated Austinian theories and the profound and compelling philosophy of Hegel have of course been principal factors in holding our adherence to what may be called the orthodox abstraction of sovereignty.

It cannot be denied that the mind finds a degree of satisfaction in the symmetry, the completeness of this theory, and of the orderliness, the strength, and safety which it may seem to assure. But is the theory realized anywhere in the life of states? Can it be? Those who ask this question, and who scruntinize history to find the answer, are sometimes stupidly lumped in one common lot by debonair critics, and their studies lightly dismissed because of a supposed failure to distinguish between the state and sovereignty and government. Nevertheless the realists are having their influence, and absolute and indivisible sovereignty is being questioned and dissected by a school or schools of growing strength and influence. The state theories of the leading modern thinkers, German and French, are admirably, though possibly not wholly judicially summarized and criticized by M. Léon Duguit in 31 HARVARD LAW REVIEW, pages 1 to 185. In England, Maitland has brilliantly uttered an arresting word in

the introduction to his translation of Gierke's *Genossenschaftsrecht*, and others, notably Dr. Figgis, have published inquiries as to what the history of certain institutions has revealed regarding the real nature of the state.

Into this discussion Mr. Laski has entered with his "Studies in the Problem of Sovereignty," and in the restricted field which he has selected for this first book his work is distinctly illuminating. He is frankly a realist, and though assuredly he recognizes that sovereignty is an abstraction, a quality attributed to the state, and that the state functions only through government, he nevertheless convincingly asserts that we cannot understand the state or its qualities without studying its functional expression. Quite apart from the details of his discussion and the conclusions reached, Mr. Laski has rendered a distinct service to the study of political science in America, Englishman though he be, by publishing here and in part at least stimulated by his observation of American institutions and his contacts with American scholars, studies based upon the functioning of the state rather than upon *a priori* metaphysical assumptions or mere descriptions of its mechanism. This newer viewpoint and method of approach has characterized most of the recent fruitful study of the natural sciences, of jurisprudence and to some extent of economics. We have had masses of merely descriptive essays in "government" and political science, much of it useful, even necessary; but after all that is the method of externalism, and alone it can never lay bare the heart of a living subject. By this it is not meant to suggest that the analytical method does not find its useful place. An admirable example may be seen in a paper, "The Juristic Conception of the State" by Dr. W. W. Willoughby, 12 Amer. Polit. Sci. Rev. 209.

In his interesting first chapter, Mr. Laski states his problem, attacks the monistic theory of the state, and in the undoubted and often unyielding allegiance to church, trade-union, party, and club finds the justification and the necessity for a pluralistic conception. "The will of the State," he says, "obtains preëminence over the wills of other groups exactly to the point where it is interpreted with sufficient wisdom, to obtain general acceptance, and no further. It is a will to some extent competing with other wills, and, Darwinwise, surviving only by its ability to cope with its environment. . . . But, it may be objected in such a view sovereignty means no more than the ability to secure assent. I can only reply to the objection by admitting it," (page 14).

The greater part of the book is devoted to an historical examination of certain controversies between state and church which afford rich material for the testing of the Hegelian theory of the state. The first of these studies, entitled the "Political Theory of the Disruption," is a running account of and commentary upon the stubborn and successful struggle of Dr. Chalmers and his dissenting followers against the Established Church in Scotland with its state-controlled patronage, a struggle which ended in the disruption of that church, a result hardly to be reconciled with a unitary theory of the state.

Then follow two extended studies of the Oxford Movement and the Catholic Revival in England. With no pretense of developing new sources, the author has sketched these deeply significant movements with great brilliancy, maintaining an attitude at once sympathetic and objective with rare judicial skill. The issue of those struggles is well known and certainly lends no support to the assumption of an absolute and supreme state in England. If, as Mr. Laski suggests, "it seems a little grimly ironical to connect the name of Bismarck with the spirit of religion" (page 239), it seems not less so to yoke De Maistre the arch apostle of ultramontanism with Bismarck, the man of "blood and iron," and yet that is what has been done in the final chapter, with interesting results and suggestion. Of De Maistre, whose theory is summarized with skill, Mr. Laski says: "He is the real author of that Ultramontanism by which the nineteenth century Papacy sought the restoration of its prestige." But

fundamentally, as Mr. Laski demonstrates, the theory developed by De Maistre, is no other than that with which Bismarck undertook the complete subordination of the church to the state, "Where De Maistre speaks of the Church, Bismarck speaks of the State: where De Maistre discusses the Papacy, Bismarck is discussing the German Empire. Otherwise, at bottom, the thought is essentially the same" (page 263). "Each saw in a world of individualization the guarantee of disruption and evolved a theory to secure its suppression. Each loved passionately the ideal of unity since that seemed to them both the surest guarantee of survival. Each saw truth as one and therefore doubted the rightness of a sovereignty that was either fallible or divisible; and each in the end came to the realization that his theories were inconsistent with the facts of life" (page 264).

Two brief appendices, entitled respectively "Sovereignty and Federalism" and "Sovereignty and Centralization," bring some phases of American experience to bear upon the problem.

Most of us who must confess to origin in the now much despised Victorian period, are probably not prepared to have the state reduced to the level of a public-service company, and indeed that is not what Mr. Laski urges; but it is high time that we address ourselves seriously to the task of evolving a theory of our American state which accords with the facts; and an Austinian theory is no longer wholly satisfying. If, as Mr. Laski admits in any such voluntarism as he speaks for, "room is left for a hint of anarchy" (page 24), the danger of the opposed theory is at least equally great. To quote the author again, "The thing of which I feel afraid, if the State be admitted limitless power, Professor Dewey has expressed felicitously in a single phrase, 'It has been instructed [he is speaking of the German State] by a long line of philosophers that it is the business of ideal right to gather might to itself in order that it may cease to be merely ideal.' Nor is what he urges true of Germany alone" (page 20).

But what we most need to do is to discover the facts and from them the truth. The state will never be absolutely secure and no unsupported theory is likely long to seriously increase or diminish the germs of conflict and danger which lie in any human society. But a theory slowly corrected by the facts, and by them brought into harmony with actuality, must aid greatly in the amelioration of the strife which the human race seems unable to avoid.

Many will doubtless disagree with Mr. Laski's conclusions; some will consider them "dangerous," but his book is an admirable essay, sound in method, vivid and scholarly, and pointing in the direction in which it is to be hoped he and others will go farther.

HENRY M. BATES.

AN OUTLINE SKETCH OF ENGLISH CONSTITUTIONAL HISTORY. By George Burton Adams. Yale University Press. 1918.

The publication of this little book recalls the fact that it is now almost half a century since the appearance of another book similar in scope and purpose and upon the same subject, the work of an unacknowledged master in the field whose importance is by no means commensurate with its small size. A comparison of Professor Adams' "Sketch" with Freeman's "Growth of the English Constitution" brings out contrasts more significant than mere differences of intellectual scholars. It is the twentieth-century view of the English constitution that stands out, sometimes in almost startling contrast over against that of the nineteenth. For Freeman gave eloquent voice to the conception of the origins of our institutions considered orthodox in his day, and one, it is not much to say, which still prevails amongst the older generation of lawyers and has not yet disappeared entirely from the textbooks.

Let us note a few differences. For the nineteenth century the constitutional developments of the centuries after the Norman Conquest are only "an altered garb of principles as old as the days when we got our first sight of our forefathers in their German forests. Changed as it is in all outward forms and circumstances, the England in which we live has in its true life a spirit far more in common with the English of the earliest times than it has with the English of days far nearer to our own." To Professor Adams "the tests which determine race in history are the characteristics of a civilization" rather than blood and "in this sense and upon the constitutional side our history (as Americans) on English soil begins in the Norman Conquest of England by William the Conqueror in 1066." Freeman is deeply impressed by the fact that the English sovereign of his day should "in so many respects hold the place of Alfred rather than the place of Richards and Henries of later times," while Professor Adams feels "compelled to say that it was the Norman conception of the office and practical operation of the kingship, not the Saxon, which became fundamental in the English constitution." As with the king, so with the Parliament after the Norman Conquest. "Be it Witenagemot, Great Council, or Parliament," says Freeman, "there has always been some body of men claiming with more or less right to speak in the name of the nation." "The Individual Baron," as Professor Adams sees him, "was not prone to regard his share in the public affairs as privilege or opportunity for the exercise of influence on the conduct of government but rather as a burden." Both these writers are filled with the greatest enthusiasm for the English constitution; Professor Freeman, because it is English, Professor Adams, because it is a constitution. The latter's departure from the older orthodoxy is entire, but his general interpretation of English history is one from which few present-day legal scholars would dissent. Here and there his statements may be considered too strong, his anti-Saxonism too complete, but the truth of his general picture of the Norman and Angevin kinds cannot easily be disputed. Whatever their origin these institutions at that time were flowing through a feudal channel and they can only be truly described in terms that are feudal, not national or popular.

The theme of Professor Adams' book is the limited monarchy, and it began, he thinks, with Magna Carta in 1215. Previous limitations of the king's power are feudal rather than national or constitutional, and even the self-limitation implied by the earlier kings' charters carried with it no machinery by which that limitation may be made effective. Magna Carta for the first time provides for a faithless or oppressive king a punishment which goes beyond the feudal *diffidatio* and rebellion of his vassals; it permits the Barons to coerce him by a collective and legalized rebellion which may be termed not inappropriately constitutional. From this crude beginning follows the long development through the baronial and parliamentary control of ministers which culminates in the modern cabinet system under which "a legislature could exercise an executive authority which in theory it did not have." The book is not a constitutional history of England. It implies rather than supplies the framework of dates and events necessary to a real history. The author's evident intention is rather to give an interpretation of these facts, his desire is "to show how modern liberty came to be what it is and what foundations our institutions have in the past history of the race." And that past history, though English, he considers as much "ours" as it is the possession of modern England. No two authors would treat this great theme in the same way, with the same emphasis, or in the same proportion. In this study, administrative history is practically omitted after Henry II, almost the whole attention being focused on the beginnings of representation and legislation; but this is not strange. The administrative history of England in the later Middle Ages and for some time after is still in manuscript. On the whole, a

reader's appreciation of this essay is likely to be greater in direct proportion to the amount of his knowledge of the facts of English history. The only positive misstatement noted is the reference to Doctor Cowell, author of the famous *Interpreter* as an "Oxford Scholar." He was Regius professor of the Civil Law at Cambridge. C. H. McIlwain.

M. ΚΡΙΤΟΥ ΤΟΥ ΠΑΤΖΗ Τιπουκειτος. Sive Librorum LX Basilicorum Summarium. Libros I–XII Graece et Latine ediderunt Contardus Ferrini-Johannes Mercati. Romae, Typis Polyglottis Vaticani MCMXIV (Coll. Studi e Testi. Vol. 25).

It is well known among Romanists how helpful the Byzantine compilations of laws are for the restoration and the interpretation of the sources of Roman law. But most of the Byzantine compilations themselves in order to be of real service are still to be edited and some of those already edited need critical revision. The most important of these compilations are the sixty books, "Τὰ βασιλικά," which reached us in a mutilated condition and were edited by the Heimbach brothers in six volumes (Lipsiae, 1833–70). A seventh volume of "Supplementa" was added by two Italian scholars, C. Ferrini and G. Mercati, in 1897. To fill the gaps and to supply the missing parts of the Basilics, Heimbach made use of the Τιπουκειτος. It is a large summary or a repertory (*τί τοῦ κοῖται; Where is it?*) of the Basilics, made in the eleventh century and to be found in only one manuscript (Vatican, 853). But in Heimbach's reading of the passages, he quotes from the Tipoukeitos so defectively, and the text of the first twelve books which he gives *in extenso* in the third volume of the Basilics was edited with so little critical accuracy as to make the work useless. In only one passage of a little more than twenty lines, Prof. F. Brandileone ("Bullettino dell' Istituto di Diritto Romano," I, pag. 106) remarked more than twenty misreadings and omissions. As early as in the year 1888, the Italian Institute of Roman Law planned an edition of the Tipoukeitos, and Professor Brandileone himself was put in charge of the preliminary work. But various difficulties, especially of a financial character, interfered with the plan, which was given up entirely after some time. Later on Prof. C. Ferrini took upon himself the by no means easy task of translating and editing the Tipoukeitos, in collaboration, for the philological part of the work, with G. Mercati, the well-known Italian scholar of the Vatican Library.

No man was more fitted for such a task than Professor Ferrini. After the death of Zacharia von Lingenthal, Ferrini was considered the most authoritative European scholar in Greco-Roman law, and Von Lingenthal himself, when old and almost blind had trusted to Ferrini his papers and notes. His edition of the Paraphrasis of the Institute of the so-called "Theophilus Antecessor" (Berlin 1883–97), the volume of "Supplementa" to the Basilics and other works of the same kind, had already established his absolute competency for editing, translating, and commenting upon the Byzantine law texts. But his work on the Tipoukeitos did not progress farther than the first twelve books, because of his unexpected death by heart failure in October, 1902. He was only forty-two years old, and at his death his bibliography numbered almost two hundred publications on Roman and Byzantine law. In 1909 one of his posthumous works was published in the "Fontes Juris Romani Ante-Justinianei in usum scholarum — Leges, Auctores, Leges saeculares," edited by S. Riccobono, J. Baviera, and C. Ferrini (Florence, Barbera, two volumes, 1909). Ferrini's contribution to this publication was the third part, where he gave the Latin translation of the "νόμοι saeculares" from the Syriac version of the London manuscript. Previously he had already published the Latin

translation of another text of the same νόμοι, contained in a manuscript of Paris (Savigny-Stiftung. XXIII, pag. 101–43).

The book published now in the collection "Testi e Studi" of the Vatican Library, contains the text of the first twelve books of the Tipoukeitos critically edited by Mercati, and the Latin translation of Ferrini. An elaborate preface by Mercati gives an accurate account of the Vatican manuscript and of the text; then it discusses at length the question of the authorship, concluding that the work is due to Patze, who wrote it about the end of the eleventh century. The nature of the evidence on which Mercati bases his conclusion is such that this question may be considered as definitely settled, and the hypotheses formulated in the past by Allatius Heimbach and Zacharia must be discarded. The text is given in the exact form in which it is contained in the manuscript, but attention is called to mistakes due to the *scriba*, and the probable original words and phrases either misspelled or omitted in the text, are proposed by the editor in scholarly notes. Ferrini's Latin translation is, as usual, faithful and clear, and couched in the exact terminology of the Roman law.

HARVARD UNIVERSITY. GEORGE F. LA PIANA.

CRIMINOLOGY. By Maurice Parmelee, Ph.D. New York: The Macmillan Co. 1918. pp, xiii, 522.

Old-fashioned lawyers regard Criminology as a pseudo-science, quite unworthy serious attention; and even progressive lawyers have doubted the title of its literature to be included in a law library of the highest class. This book will give aid and comfort to the holders of such opinions.

The reviewer believes firmly that there is a useful and sufficiently exact science of Criminology; that among its materials are comparative criminal law, the history of crime, criminal psychology as illustrated in reported trials, and penology as a study of the social effect of punishments. Such a Criminology, a study of legal and social phenomena as a means to a social end, should be a fruitful subject of investigation for a lawyer. Doubtless Dr. Parmelee would claim that this book represents such a study and with such an object. If so, he has chosen the wrong material, or his social aim is unsound, or his lack of legal training prevents him from writing a useful book for a lawyer.

Dr. Parmelee is an earnest and conscientious writer; he has brought together many facts and opinions about crime and punishment which ought to be in the minds of counsel, judges, and legislators. The book is a useful compendium for the careful reader in a subject where better books are hard to find. But it is not the result either of original investigation or of special knowledge in its field; and its errors in the field of law lead a lawyer to distrust the book in other less familiar branches of knowledge.

The author's treatment of every subject is didactic; and he mistakes assertion for proof. Hardly an actual case is cited. Logic is not one of the numerous sciences he mentions as useful to a criminologist. If he were familiar with the practice of the science he could hardly assert woman's physical inferiority to man in one paragraph, and in the next deny the possibility of her moral superiority on the ground that she inherits from both male and female parents (page 240). His superficial knowledge of law is represented by his conjecture (page 256) that the Roman law is frequently called the Civil law because the Romans developed the civil side of their law more fully than the criminal side. We are surprised to learn (page 311) that the election of judges "in the olden days when the power of kings and of the aristocratic class was still great . . . was a valuable guarantee of popular rights." His idea of a special law-school course in criminology "for those who wish to prepare for this branch of the

judiciary," namely, the criminal magistracy (page 330) shows an imperfect knowledge of that social structure which he desires to reform. His misconception of the nature of crime, which seems fundamental, may be illustrated by his statement (page 247) that prostitution is not really crime, although made so by statute, because the action is due to natural human impulses, does not give rise to a conflict between individual interests, and is a professional activity.

These, it may be urged, are mere microscopic defects in a comprehensive work. They seem to the reviewer to indicate an ignorance of the essential subject-matter of the science. But the author seems to have fundamental limitations which lead him to ignore valuable factors in civilization, and thus reach a partial, if not a partisan, view of the subject. To him, religion is merely superstition; morality is only the *scientia morum;* education, the assembling of information about the physical world. The gross materialism of his philosophy is united with a sort of mechanical sentimentality on the subject of penology which hardly carries conviction.

J. H. BEALE.

THE LAW OF TRADING WITH THE ENEMY. By Charles Henry Huberich. New York: Baker Voorhis Company. 1918.

This book is primarily a commentary on the Act of Congress of October 6, 1917, known as "The Trading with the Enemy Act"; as a commentary its value is doubtful. The proofs were closed too late to include certain fundamental executive orders of February, March, and April, and certain fundamental decisions have changed something of what is stated as law in the book. Some problems, moreover, that have been discussed in recent decisions are not touched upon in the volume. Though this is not the author's fault, it of course renders the book far less valuable than a slightly later book would have made it. Nor does Mr. Huberich point out the important particulars in which American legislation differs from the English Act of 1914. He does not distinguish adequately what is new in substance and effect in the present law in its relation to older theories of neutrality and contraband. He does not give the forms of the war trade board or the custodian of alien property, though he does summarize the certain orders and a treasury decision preceding the act. Mr. Huberich's views are valuable but uneven. His wide continental experience makes his comments upon the position and powers of an alien enemy particularly useful. Its citations are accurate and full. It is certainly an improvement on the volumes of Schuster and of Campbell which have come to us from England. Its practical utility lies in the fact that it is the latest treatment we possess upon the subject which yesterday was all but academic and today is of vital importance. It will be a source of satisfaction to every student of International Law if Mr. Huberich would so revise his book as to make it that standard of treatise he is so uniquely qualified to write.

CHARLES MARVIN.

HANDBOOK OF CRIMINAL PROCEDURE. By William L. Clark, Jr. Second Edition by William E. Mikell. West Publishing Company. 1918. pp. xi, 748.

This is one of the "Hornbook Series" and presents the familiar features of that series. It is an attempt to state in summary fashion the existing law. The scope of the field and the importance of local technicalities add to the difficulties of such treatment. The editor speaks in his preface of the uneven progress toward de-technicalization of criminal procedure which has marked

the two decades since the appearance of the first edition. The fact that about one-third of the present volume is devoted to the requirements of indictments suggests that something is left to be accomplished in that field of legal reform.

Others might differ with the author's judgment as to the proper limitations of his subject. Fifty pages devoted to questions of evidence seem either too much or too little. And one might expect to find discussion of some matters which are omitted. For instance the book is silent upon the technical and important questions of procedure which arise when a federal offender is apprehended in a district other than that in which the indictment was returned.

Probably the fact that this is a second edition indicates that the work has found a place with the profession. Those to whom it has been helpful will be glad to have the notes and citations brought up to date. Those who prefer the Reports and Digests or local manuals of practice and procedure will continue to use them.

H. La Rue Brown.

Modern Business Corporation. By William Anna Allen Wood. Second Edition. Indianapolis: The Bobbs Merrill Company. 1917.

This is a compact manual of Corporation Law which may be useful to the student of economics and the ordinary reader. It includes a chapter on Taxation which has a special utility for those public officials upon whom devolves the administration of tax laws. The book is not especially valuable for lawyers, and on some topics, notably on the subject of *Ultra Vires*, to which one page is allotted, the treatment is so sketchy as to be worthless. The one hundred and forty-eight corporate forms are gone through *seriatim*, and some useful comment is made upon articles of agreement by unincorporated associations. The most valuable part of the book is the Appendix, in which are included the rules of the New York Stock Exchange, federal statutes regulating corporations, a typical blue-book law, and various tables of the income-yielding capacity of stocks and bonds; but were this not a second edition this volume would hardly be a justified addition to a field already more than fully occupied.

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TABLE OF CONTENTS

ARTICLES

INDEX-DIGEST

References in heavy-faced type are to **Notes** and **Book Reviews**; in plain type to **Recent Cases**; and in italicized type to **Articles**.

A

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

B

C

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicised type to ARTICLES.

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

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References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

D

E

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

F

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

G

H

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

I

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

J

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

L

M

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

N

P

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Q

R

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

S

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

T

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

U

V

W

References in heavy-faced type are to NOTES and BOOK REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES.

BOOK REVIEWS

TABLE OF CASES

References in heavy-faced type are to NOTES; all others are to RECENT CASES. Citations to decisions which were noticed before their appearance in any regular report have been supplied wherever possible.